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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 195.

JACOB MAGEE AND HENRY HALL, PLAINTIFFS IN ERROR,

vs.

THE [MANHATTAN LIFE-INSURANCE] COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

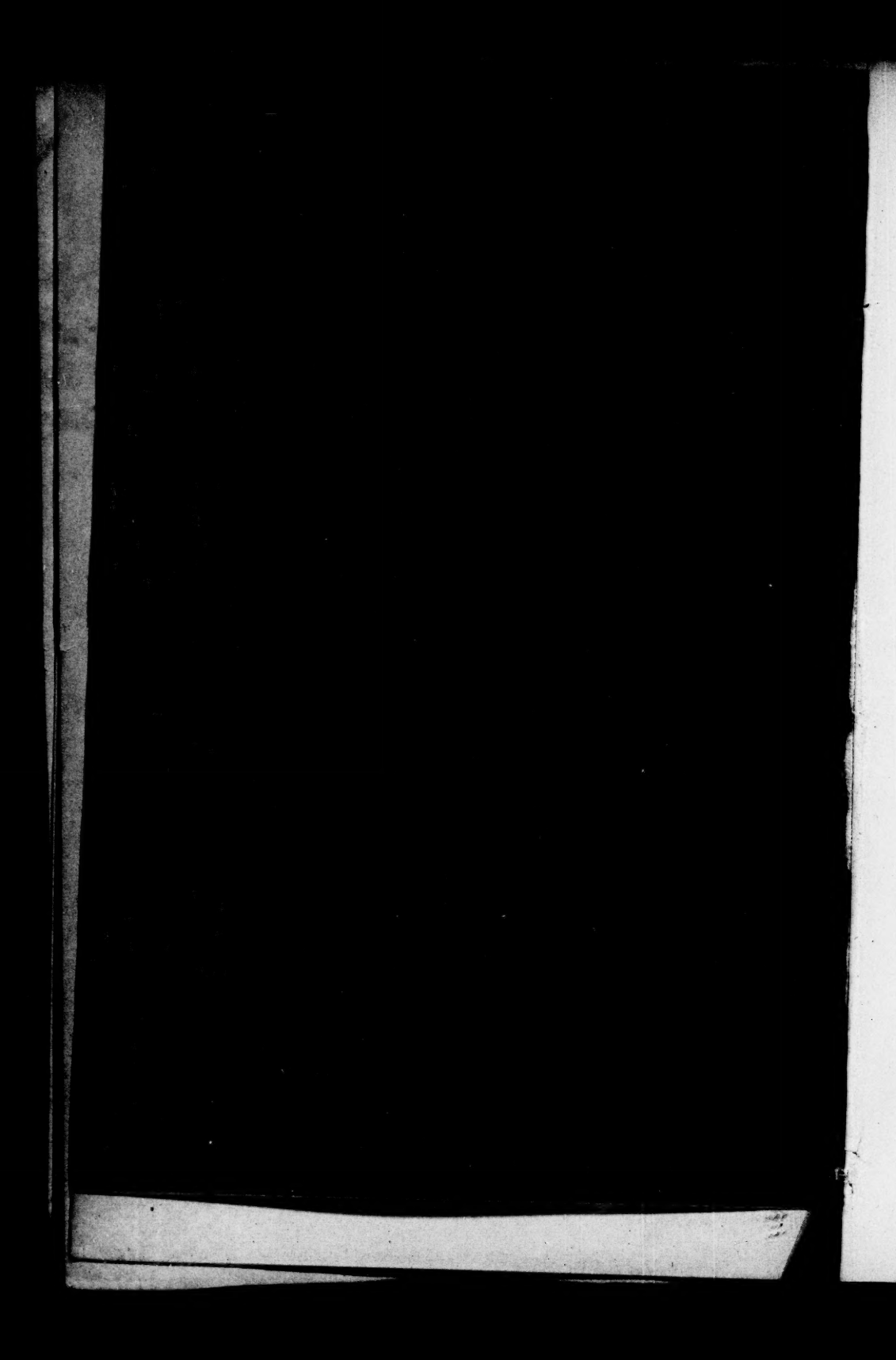
FILED JUNE 29, 1874.

Reversed

Affirmed

5 to 4

Jno. Swayne to write.



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1 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the fifth judicial circuit and the southern district of Alabama, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Manhattan Life-Insurance Company and Jacob Magee and Henry Hall, a manifest error hath happened, to the great damage of the said Jacob Magee and Henry Hall, as by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, 1874, in the said Supreme Court, to be then and there held, that, the record
2 and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness honorable Nathan Clifford, acting as Chief-Justice of the said Supreme Court, being next in precedence to the Chief-Justice, the office of Chief-Justice of our Supreme Court being now vacant, the 4th Monday of December, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the 5th Judicial Circuit and Southern District of Alabama.

Filed December 31st, A. D. 1873.

N. W. TRIMBLE, *Clerk, &c.*

A copy of this writ of error was filed in the clerk's office for the defendant in error the 31st day of December, A. D. 1873.

N. W. TRIMBLE, *Clerk.*

3 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Manhattan Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein Jacob Magee and Henry Hall are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, acting as Chief-Justice of the Supreme Court of the United States, being next in precedence
4 to the Chief-Justice, the office of Chief-Justice of our Supreme

Court being now vacant, this the 31st day of December, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] W. B. WOODS,
U. S. Circuit Judge.

Service of citation.

Personally appeared before me N. W. Trimble, clerk of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, Henry S. Skaats, who makes affidavit that he served a true copy of the foregoing citation by handing the same to John T. Taylor, one of the attorneys for the Manhattan Life-Insurance Company, on the 5th day of January, A. D. 1874.

HENRY S. SKAATS.

Subscribed and sworn to before me this 5th day of January, A. D. 1874.

N. W. TRIMBLE, *Clerk, &c.*

Filed January 5th, 1874.

N. W. TRIMBLE, *Clerk.*

(Indorsed:) Filed December 31st, 1873. N. W. Trimble, clerk.

5 *Bond.*

Know all men by these presents that we, Jacob Magee, Henry Hall, as principals, and Mr. Waring and W. H. Ketchum are held and firmly bound unto the Manhattan Life-Insurance Company in the sum of eight thousand dollars, to be paid to the said Manhattan Life-Insurance Company, their successors or agents, and to the payment thereof we bind ourselves, jointly, severally, and firmly by these presents, sealed and dated this the 3rd day of January, 1874.

The condition of the above bond is this: Whereas the said Manhattan Life-Insurance Company, on the 29th day of December, 1873, recovered a final judgment in the circuit court of the United States for the 5th judicial circuit and southern district of Alabama, for the sum of four thousand nine hundred and seventy dollars $\frac{77}{100}$, besides costs, against the said Jacob Magee and Henry Hall, and said Jacob Magee and Henry Hall have obtained a writ of error, and filed in the clerk's office of said court a copy thereof, to reverse said judgment in said suit,

6 and also a citation to the said Manhattan Life-Insurance Company citing and admonishing them to be and appear before the Supreme Court of the United States, to be holden in the city of Washington on the second Monday of October next, A. D. 1874.

Now, if the said Jacob Magee and Henry Hall shall prosecute their writ of error to effect, or failing therein, shall pay the judgment rendered in said circuit court, and such judgment as may be rendered in said Supreme Court to which said writ of error is taken, and also such costs and damages as may be awarded against them, then the above and foregoing bond to be null and void; otherwise, to remain in full force.

Witness:	N. W. TRIMBLE.	(S'gn'd)	HENRY HALL.	[SEAL.]
"	N. W. TRIMBLE.	"	JACOB MAGEE.	[SEAL.]
"	N. W. TRIMBLE.	"	M. WARING.	[SEAL.]
"	N. W. TRIMBLE.	"	WM. H. KETCHUM.	[SEAL.]

Taken and approved January 3rd, 1874.

(S'gn'd) N. W. TRIMBLE, *Clerk.*

Filed January 3rd, 1874.

N. W. TRIMBLE, *Clerk.*

TUESDAY MORNING, *January 6th*, 1874.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, judge, presiding.

7 *Minute entry as to bond.*

* * * * * * *
* * * * * * *

THE MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL. } No. 368.

The defendants, Jacob Magee and Henry Hall, presented in open court a bond in this case to supercede the execution, pending their writ of error to the Supreme Court, executed by them, as principals, with Moses Waring and William H. Ketchum, as sureties, in the sum of eigh thousand dollars, and said bond is approved by the court.

Summons and complaint.

UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to summon Jacob Magee and Henry Hall, who are citizens of the State of Alabama, to appear before the circuit court aforesaid, at the place of holding said court at
8 Mobile, on the 2nd Monday of April next, then and there to answer the complaint of the Manhattan Life-Insurance Company, who are citizens of the State of New York, and have you then and there this writ.

Witness Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, this 4th Monday of December, in the year of our Lord one thousand eight hundred and seventy-two.

Issued the 22nd day of January, in the year of our Lord one thousand eight hundred and seventy-three

[SEAL.] Attest: N. W. TRIMBLE,
Clerk C. C., Southern Dist. Ala.

I acknowledge myself security for costs, at the instance of the plaintiff in the above suit.

Mobile, January 7th, 1873.

(S'gn'd) F. STEWART.

Complaint.

UNITED STATES OF AMERICA:

Circuit court of the United States fo the southern district of Alabama.

THE MANHATTAN LIFE-INSURANCE COMPANY, plaintiffs,
vs.
JACOB MAGEE AND HENRY HALL, DEFENDants.

9 The plaintiff, who is a body-corporate, duly incorporated under

and by virtue of the laws of the State of New York, and who is a citizen of said State, claims of the defendants, who are citizens of the State of Alabama, the sum of five thousand dollars and interest thereon. And the plaintiff alleges that heretofore, to wit, on the 2nd day of March, 1870, the said defendants, together with one Henry V. H. Voorhees, (who is not sued in this action,) made and delivered to the plaintiff their certain bond in words as follows:

"Know all men by these presents that we, Henry V. H. Voorhees, as principal, and Jacob Magee and Henry Hall, as securities, of the town of Mobile and State of Alabama, are held and firmly bound unto the Manhattan Life-Insurance Company of the city of New York, in the sum of five thousand dollars, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"The condition of this obligation is such that, if the above-bounden Henry V. H. Voorhees, who has been appointed an agent of the
10 said The Manhattan Life-Insurance Company, shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from the said The Manhattan Life-Insurance Company, and shall on the first day of each month remit to the office of said company all moneys received by him (not previously remitted) as such agent, less his commissions, together with his account of the same, then the above obligation to be void; otherwise to remain in full force and virtue;" which said bond with the said conditions was duly signed, stamped, and delivered to plaintiffs by said defendants.

And the plaintiff avers that after making of said bond, at sundry times between that time and the bringing of this suit, and while the said Voorhees was acting as such agent, he received, as agent, as aforesaid, a large amount of money for and on account of plaintiff, to wit, the sum of five thousand dollars, which it was his duty, as agent, to pay over to plaintiff, but which he failed to do.

And the said plaintiff claims as a further breach of said bond,
11 that at the time of the making and the delivering of said bond, the said Voorhees had been acting as the agent of said company as aforesaid, and had received as such agent for said plaintiff a large sum of money, to wit, the sum of five thousand dollars, which was still in his hands when said bond was signed and delivered, and which he was bound to pay to said plaintiff according to the conditions of said bond, but which he has failed to do, though often requested.

Which said sums of money are due and unpaid, together with the interest thereon.

(S'gn'd) TAYLOR & MACARTNEYS,
Plffs. Attorneys.

Filed January 22nd, 1873.

N. W. TRIMBLE, *Clerk.*

(Endorsed:) I appear for the defendants, Hall & Magee, this 29th January, 1873, and now plead, after having read the bond as on oyer, that the condition of said bond has been performed. And it is agreed that any evidence may be given that will defeat the action or reduce the amount as if correctly pleaded.

(S'gn'd) E. S. DARGAN, *For Defts.*

12 And the plaintiff joins issue on the above pleas.

(S'gn'd) TAYLOR & MACARTNEYS.

Filed January 22nd, 1873.

N. W. TRIMBLE, *Clerk.*

Pleas.

In the circuit court of the United States for the southern district of Alabama.

THE MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL.

And now comes the defendants, by their attorney, and having craved oyer of the bond and the condition thereto attached, and the same having been read to them, they say actio non because, they say that Henry Voorhees, the principal in said bond, did well and truly account for and pay to the plaintiffs every dollar of money that came to his hands, as agent of the plaintiffs, from the day of the execution of said bond until the day this suit was brought, and did faithfully perform all the duties required of him as agent, according to the true intent and meaning of said writing obligatory, and the condition thereto at-
13 tached. Therefore they say there has been no breach of the condition of said bond, and this they are ready to verify.

Second. And these defendants, for a further plea, say actio non, because they say that for a long time before the execution and delivery of said writing obligatory the said Henry Voorhees, the principal in said bond, had been the agent of the plaintiffs in Mobile in carrying on the business of plaintiffs in the insurance business, the nature of which is set forth in the condition of said bond, and previous to the giving of said bond the said Henry Voorhees had become indebted to plaintiff in a large sum, as such agent, for money received by him as such agent, and not paid over to plaintiff; and it was agreed between the said Henry Voorhees and the plaintiff before the giving of said bond that he should give the bond described in the complaint, and should continue to act as the agent of said plaintiff in said business, and that all the money he should receive from the business of plaintiffs after the giving of said bond should be credited by the plaintiffs on the old indebtedness of
14 Voorhees to said plaintiffs until said indebtedness was paid off. And said defendants further aver that said Voorhe's, after giving said bond, did well and truly pay to the plaintiffs all sums of money received by him in said business, and to which said plaintiffs were entitled; and said plaintiffs, in pursuance of said agreement, entered into before the execution of said bond, credited the old account of said Voorhees with said money, until the same was paid or thus liquidated. And they further aver that at the time of executing said bond these defendants had no notice of said agreement, nor of the fact that Voorhees was in arrear or indebted to plaintiffs on said business. And they further say, that said secret agreement between said plaintiffs and said Voorhees, and its fulfillment, was a fraud on these defendants, for said Voorhees had no means or property of his own to account for and pay again to the plaintiffs the monies received by him as plaintiff's agent. Hence their said writing obligatory is null and void as to these defendants, and this they are ready to verify.

15 And, for a further plea, these defendants say that before the execution and delivery of said bond Henry Voorhess was largely indebted to said plaintiffs for monies before that time received by him, belonging to plaintiffs, in conducting their business as agent in Mobile, of which these defendants had no notice; and the plaintiffs required of him the bond described in the complaint as a condition on which only

they would retain him in their employment, as agent in Mobile, in conducting their business, and besides the bond, the plaintiffs required of said Voorhees a promise or agreement that all his future commissions and interest he might acquire and earn in conducting their business afterwards, he, the said Voorhees, should pay to the plaintiffs, to be applied to his then past indebtedness, for which said plaintiffs had no security.

The plaintiffs then well knowing, for so the fact was, that said Voorhees had no property or means of his own by or out of which his said past indebtedness could be paid. They also well knew, and so the fact was, that he could not support himself and family but by means
16 of his future acquisitions by his labor, and therefore the appropriation of his commissions and interest in all his future acquisitions in conducting plaintiff's business would compel him, said Voorhees, to appropriate a similar amount to his support out of monies received by him belonging to plaintiffs.

And they further aver that said Voorhees did promise and agree with said plaintiffs before said bond was executed that he would pay said plaintiffs all his commissions on the monies that he might afterwards receive in conducting their business, to be applied to the then past indebtedness of said Voorhees to said plaintiffs. And these defendants further aver that at the time they executed said bond, which was as the securities of said Voorhees, they had no notice or knowledge of said agreement between said Voorhees and said plaintiffs, nor any notice or knowledge that he, said Voorhees, had fallen behind hand or had become indebted to plaintiffs. And if they had been informed of said agreement or of said indebtedness, they would not have executed said bond.

And these defendants further allege that, in pursuance of said
17 agreement, the said Henry Voorhees did pay said plaintiffs all his commissions afterwards earned and acquired in the business of the plaintiffs, which was carried to the credit of his past indebtedness to them, in pursuance of said agreement, but retained a corresponding amount from the monies of the plaintiffs he afterwards received, as he was compelled from necessity to do. And they further aver that said agreement and its execution as set forth in this plea was a fraud on these defendants, and therefore they are not bound by said writing obligatory, but the same, as to them, is void, and of this they are ready to verify.

(S'gn'd) E. S. DARGAN, *for Defts.*

Filed April 14th, 1873.

(S'gn'd) N. W. TRIMBLE, *Clerk.*

Demurrer.

And the plaintiff comes and demurs to the 3rd plea of defendant, and for grounds of demurrer, says that the plea contains no facts that if proved would bar the suit; that there does not appear any connection between said alleged promise of said Voorhe's and the said bond.
18 No fraudulent intent is charged, nor is there any charge showing any legal right of said securities in said commissions, nor that said Voorhees was in arrear for any moneys or in default to any one at the time he paid over said commissions, or that said Voorhees had not other business from which to support himself, and because not in the written contract.

(S'gn'd) JOHN T. TAYLOR, *for Plffs.*

Filed April 14th, 1873.

Notice of interrogatories filed.

Circuit court of the United States for the 5th circuit and district of Alabama.

THE MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL.

To E. S. Dargan, atty. of record

Please take notice that in the foregoing stated cause pending in the circuit court of the United States for the fifth judicial circuit and district of Alabama, interrogatories to be propounded to J. A.
19 Pleasants, J. L. Halsey, and Mr. Riglander, witnesses on behalf of the said plaintiff, have been this day filed in my office, which said interrogatories will remain on file as aforesaid ten days after service of this notice upon you, during which time you can file cross-interrogatories if you think proper.

(S'gn'd) N. W. TRIMBLE,
Clerk U. S. Cir. Crt. Sou. Dist. Ala.

(Endorsed.)
Rcd. April 30th, 1873. Executed this 1st day of May, 1873, by serving a copy of the within notice on E. S. Dargan.

(S'gn'd) R. W. HEALY,
U. S. Marshal,
By GEO. COTTIN,
Deputy.

Notice.

Circuit court of the United States in the fifth circuit and district of Alabama.

MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL. } No. *No.* 368.

To Taylor & Macartneys, attorneys of record:

Please take notice that in the foregoing-stated cause, pending in the circuit court of the United States for the 5th judicial circuit and
20 district of Alabama, interrogatories to be propounded to Henry V. H. Voorhees, a witness in behalf of the said defendants, have been this day filed in my office, which said interrogatories will remain on file as aforesaid ten days after service of this notice upon you, during which time you can file cross-interrogatories if you think proper.

May 7th, 1873.

N. W. TRIMBLE, *Clerk, &c.*

(Endorsed:)
Rcd. May 8th, 1873, and executed same day, by serving copy of the within notice of interrogatories on John T. Taylor.

(S'gn'd) R. W. HEALY,
U. S. Marshal,
By GEORGE COTTIN,
Deputy.

Commission.

UNITED STATES OF AMERICA:

court of the United States for the fifth judicial circuit and southern district of Alabama.

To P. J. Moore, W. J. Clopton, and John H. Gilmer, esqrs., greeting:

MANHATTAN LIFE-INSURANCE CO.
vs.
JACOB MAGEE AND HENRY HALL.

Know ye that we, in confidence of your prudence and fidelity,
21 have appointed you, and by these presents do give you, or any of you, full power and authority to examine J. A. Pleasant as witness in a cause pending in our said court, wherein the Manhattan Life-Insurance Co. is plaintiff and Jacob Magee and Henry Hall are defendants.

And therefore we command you, or any of you, that on the 11th of September, 1873, you do cause the said J. A. Pleasant to come before you, or either of you, and then and there examine him on oath as witness in the cause aforesaid, upon the interrogatories and cross-interrogatories hereto annexed, and that you, or either of you do take such examination and reduce the same into writing, and return the same annexed to this writ, closed up, under your seals, or the seal of any one of you, into our said circuit court, with all convenient speed.

(SEAL U. S. CIRCUIT COURT, SO. DIST OF ALA.) Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the 2d Monday of April, in the year of our Lord one thousand eight hundred and seventy-three.

22 Issued the 1st day of May, 1873.

Attest:

(S'g'd) N. W. TRIMBLE,
Clk C. C. Sou. Dis. Ala.

Interrogatories.

U. S. circuit court, Mobile.

MANHATTAN LIFE-IN. CO.,
vs.
JACOB MAGEE, HENRY HALL.

Interrogatories to J. A. Pleasant, a witness for plaintiffs, residing in Richmond, Va.

1. Do you know the parties?
2. Do you, and have you had in your possession the bond, sued on in this case?
3. Whether or no you was acting as the agent of the plaintiffs on the 2nd day of March, 1870, when said bond was executed, & whether the same was made and delivered to you, and please state all the circumstances attending its requirement, execution, and delivery.

4. Whether you ever had any intercourse with either of said defendants about said bond, or said or did anything to induce them or
23 either of them to sign the bond?

5. Whether or no there was any understanding between you and Mr. Voorhees that the money to be collected by Voorhees, after the execution of said bond, should be divided and paid on his previous defaults, to the prejudice of these securities? And please state whether or no any such credits were ever made or entered, other than the commissions of said Voorhees.

6. Whether or no there was any secret arrangement, contract, or agreement between you and said Voorhees intended in any manner or way to charge said securities illegally or wrongfully? Please state exactly all that was said and done, and the objects & purposes thereof.

7. Whether there was any contract about the commissions or profits of said Voorhees, or was there simply a voluntary promise by Voorhees? State what it was, and all the circumstances connected with it.

8. If any of the commissions of Voorhees were applied to his
24 old indebtedness, state whether the application was in all cases directed by him, or how they came to be so applied.

9. Please state fully any other matter of fact known to you that may be material to the parties on the trial of this cause, and attach such letters, papers, and accounts that you may have connected with the matter in controversy.

(Signed) TAYLOR & MACARTNEYS,
For Plaintiff.

NOTE.—Plaintiff nominates as commissioners to take this evidence P. J. Moore, W. J. Clopton, and John H. Gilmer, all of whom, as also said witness, reside in Richmond, Va.

TAYLOR & MACARTNEYS,
For Plff.

Oath.

STATE OF ALABAMA,
Mobile County:

Personally appeared before me, N. W. Trimble, clerk of the said circuit court, John T. Taylor, atty. for plaintiff in the above cause, who on oath says that he is informed and believes that J. A. Pleasants is a
25 material witness for the plaintiff in said case, and that said witness resides out of this State, to wit, in the State of Virginia.

(S'g'd) JNO. T. TAYLOR.

Sworn to and subscribed before me this 23d day of April, 1873.

(Signed) N. W. TRIMBLE, *Clerk.*

(Endorsed:)

Rec'd April 30th, 1873. Executed this 1st day of May, 1873, by serving copy of the within interrogatories on E. S. Dargan.

(Sgd.) R. W. HEALY,
U. S. Marshal,
By GEO. COTTIN,
Deputy.

Cross-interrogatories.

MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL, DEFTS. } Cross-interrogatories to J. A. Pleasants.

1st. Do you not know that Henry Voorhees, the principal in the bond, had been acting as the agent of the plaintiff at Mobile before the
26 bond was executed; and had he not fallen in arrear, and had become indebted as such agent to the plaintiff; & to what extent was he so indebted?

2nd. After Voorhees' default, would he have been continued in plaintiff's employment without bond & security? If he would, why was bond & security required of him?

3rd. Did you converse with Magee & Hall before they signed the bond? If yea, did you tell them of Voorhees' default before bond & security were required of him?

4th. When did you ever tell them, or either of them, that it was the agreement between Voorhees & the company that he should devote and apply all his commissions earned after the giving of *the giving of* the bond, to his past indebtedness to the company? Did you ever tell them of this understanding and agreement, or of any such understanding or agreement?

5th. What amount of commissions, earned by Voorhees, after
27 giving the bond, did he apply to his past indebtedness? State particularly if you can, and if you cannot state the precise amount, then give the amount as near as you can.

(Signed) E. S. DARGAN,
Atty. for Defts.

Filed May 1st, 1873.
(Sgd.) N. W. TRIMBLE, *Clerk.*

Testimony of J. A. Pleasants.

MANHATTAN LIFE-INSURANCE CO.
vs.
JACOB MAGEE & HENRY HALL.. }

STATE OF VIRGINIA,
City of Richmond, to wit:

I, Wm. J. Clopton, duly appointed commr., &c., &c., to take the deposition of J. A. Pleasants & to examine him on oath upon the interrogatories & cross-interrogatories hereto annexed & herewith returned, as will fully appear by the commission hereto annexed & herewith returned, under the seal of the U. S. circuit court of the southern district of Alabama, do certify that, on this day, the 11th of September, 1873, at the said city & in the State aforesaid, J. A. PLEASANTS, having been
28 first duly sworn, in answer to the several interrogatories & cross-interrogatories deposed as follows, to wit:

Answer to 1st interrogatory. I know the plaintiff, & have a very slight acquaintance with Mr. Hall, who is one of the defendants. I have never to my knowledge seen the deft. Magee.

Answer to 2nd int'y. I had the bond in my possession for an hour or two, & transmitted it by mail to the pltff.

Answer to 3rd int'y. In the spring, I think, of 1870, I was instructed by the president of the Manhattan Life-Insurance Company of New York to go to Mobile & get a settlement of the accounts of H. V. H.

Voorhees, the agent of the company for that city, who was said to be in arrears. At that time I was the general agent of the company for the States of Virginia, North & South Carolina, Georgia, & Alabama. Immediately upon my arrival at Mobile, Mr. Voorhees admitted his indebtedness, amounting to several thousand dollars, and that he was not
29 prepared to pay the money. He represented to me that he had not been engaged in any kind of speculation, but that his business during the past year or so had been less profitable than he had expected, and that almost unawares he had outlived his income, and become gradually embarrassed by debt. He said his indebtedness to others than the Manhattan Company was very inconsiderable, & his accounts with fire-insurance companies which he represented were all settled & square; that he had in his hand orders from parties in England to purchase cotton, and believed that his commissions from that source would in a short time relieve him of his pecuniary troubles; that, at any rate, he had reduced his expenses during the past month or two, & by the exercise of rigid economy intended to live upon his income from fire insurance, &c., & that so long as he owed a dollar to the Manhattan, he would remit the entire amount of his collections to the company, leaving them to credit his acct. with the commissions. He manifested
30 a great deal of feeling with regard to his position, and stated that if I insisted, he would sell out his household-furniture, and pay me the last dollar he could raise. In the course of two or three days, I got from him a full & complete statement of his accounts with the Manhattan Company, showing a balance against him, according to my present recollection, of nearly four thousand dollars. I then stated to him that I would very cheerfully recommend a continuance of his agency, and allow him every reasonable indulgence in the matter of time, provided his friends in Mobile would go his security; but that as his account then stood, the company could not think of enlarging his indebtedness by continuing to send him renewal-receipts for collection without any sort of bond or security. I then handed him a printed form, such as the company was in the habit of using for agents' bonds. He said he had no doubt he had a number of responsible friends who
31 would not hesitate to be his sureties. He said he would go at once and see about it; but the name of no individual was suggested or named as surety, either by Mr. Voorhees or myself. In a short time he handed me the bond filled up, and signed by himself & Mr. Magee. As I had never heard of the latter gentleman, I made some enquiry in regard to his solvency merely, and then told Mr. Voorhees it would be more satisfactory to me, if he would get another name, though I was advised that Mr. Magee was a responsible man. In the course of an hour or two, he brought the bond back with Mr. Hall's name added to it. I had met Mr. Hall at Mr. Voorhees' house and elsewhere, socially, several times, but had never exchanged a word with him in regard to any matter of business, and knew nothing about his responsibility. I therefore made enquiry on that subject and told Mr. Voorhees I was entirely satisfied. I sat down in Mr. Voorhees' office, and immediately wrote the Manhattan Company repeating Mr. Voorhees' repre-
32 sentations to me, expressing my confidence in his purpose to act honorably, enclosing the bond, and recommending the continuance of his agency. Having no other business to detain me in Mobile, I returned home at once. I would state that Voorhees & Myers were appointed agents of the company some time about the winter of 1865 & '66, upon my nomination, & and after the death of Mr. Myers, the agency was continued with Mr. Voorhees, whom I regarded as a very good insurance-agent, & for whom I had conceived a very friendly regard.

Answer to 4th int'y. My answer to this is fully set out in the last answer. I did not know that either of them would be asked to sign the bond, & never saw them after they signed it, & never did *did* anything to induce them to sign it.

Answer to 5th int'y. There was no understanding between us
33 except such as is set forth in the answer to the third interrogatory. I know nothing whatever about any payments that were afterwards made by Voorhees, or credits given him on his accounts, except that he mentioned incidentally in subsequent correspondence that he had remitted his renewals without deducting commissions. He made all his money-returns directly to the home office, & not through me.

Answer to 6th int'y. There was no such arrangement, contract, or agreement. I have already stated as exactly as I could all that was said & done, & the objects & purposes thereof.

Answer to 7th int'y. I have already fully answered this question.

Answer to 8th int'y. I know nothing about the subjects embraced in this question.

Answer to 9th int'y. I have no letters, papers, or accounts con-
34 nected with the matter in controversy. I do not know that I can add anything to the testimony already given. I went to Mobile simply to collect or secure the money due to my company. In doing this, I consulted with no one at all except in regard to the solvency of the sureties. I had no secret arrangement, agreement, or understanding of any kind, & had no suspicion that Mr. Voorhees would attempt or perpetrate any fraud, concealment, or misrepresentation upon or to anybody.

Answer to 1st cross-interrogatory. This question is already fully answered.

Answer to 2nd cross-int'y. I think he would not have been so continued.

Answer to 3rd cross-int'y. I had no conversation with either of them, as already stated.

Answer to 4th cross-int'y. As already stated, I never had any conversation or agreement with either of them about the matter.

35 Answer to 5th cross-int'y. I know nothing about the amount of the commissions earned, paid, or credited by or to said Voorhees. My residence is in Richmond, and I do not visit the home office more than once a year. When there I have nothing to do with the money-accounts of agents unless my attention is specially called to some case of default. The books of the company will doubtless furnish a full answer to this question.

(Signed) J. ADAIR PLEASANTS.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, Wm. J. Clopton, the said commissioner, do further certify that the identity of the said witness, J. A. Pleasants, is known to me; that the above testimony was written down by me in the words of the witness; and the answers of the said witness being read over to him by me, that he signed & swore to the same, as appears above, in my presence this day; and further that I am neither of kin or counsel to either of said
36 parties, and have no interest in said suit.

Witness my hand and seal this 11th day of September, A. D. 1873.

[SEAL.] (Signed) WM. J. CLOPTON,
Commissioner.

Interrogatories.

U. S. circuit court, Mobile.

MANHATTAN LIFE-INSURANCE CO.
vs.
JACOB MAGEE & HENRY HALL.

Interrogatories to be propounded to Mr. A. L. Grabfelder, J. L. Halsey, and Mr. J. W. Riglander, material witnesses for complainant, residing in the city of New York.

1. Please state whether or no you have any knowledge of the bond sued on in this case, and whether or no you had any conversations with H. V. H. Voorhees and the said defendants in relation thereto. If so, state when, under what authority you acted, and what was said and done.

2. Whether or no you know of any default on the part of Voor-
37 hees in not paying over money received by him as agent for said company. If you can, please state an account showing the several sums, with dates, credits, &c., and the sums now due, and how you obtained the items of said account.

3. Whether or no you examined the books and accounts of said Voorhees as to said defects, in company with said defendants, or whether an account was furnished you by said defendants, alleged by them to be the proper accounts. If so, attach it, or a copy.

4. Whether or no you were connected with or acted in any way in taking this bond in the first instance. Whether you talked with the defendants about it. When? What did they say? At whose instance, and whether they ever saw or conversed with plaintiff, or any of its agents, in relation thereto.

5. Whether you know of any fraud of any kind. Whether these defendants ever put up fraud as a defence. If so, when & what?
38 Did they pretend any such thing in your negotiations with them?

6. State any other matter of fact that may benefit the parties known to you.

(Signed) TAYLOR & MACARTNEYS,
Attys. for Plffs.

Plaintiff suggests as commissioners to take this evidence Hugh L. Cole, B. Macloy, and Nicholas Murray, both of whom, as also said witnesses, reside in the city of New York.

(Signed) TAYLOR & MACARTNEYS,
Plffs. Attys.

STATE OF ALABAMA,
Mobile County:

Personally appeared before me, N. W. Trimble, clerk of the said circuit court of the United States, Mr. John T. Taylor, atty. for plffs. in the above case, who, being duly sworn, says that he is informed and believes that J. L. Halsey, A. L. Grabfelder, and Mr. Riglander are material witnesses for said plaintiff in the above cause, and that they reside out of this State, to wit, in the State of New York.

(Signed) JNO. T. TAYLOR.

39 Sworn to and subscribed before me this 22d April, 1873.
(Signed) N. W. TRIMBLE, *Clerk.*

Filed April 22d, 1873.
(Signed) N. W. TRIMBLE, *Clerk.*

(Endorsed :)

Recd. April 30th, 1873. Executed this 1st day of May, 1873, by serving a copy of the within interrogatories on E. S. Dargan.
(Signed) R. W. HEALY,
U. S. Marshal,
By GEO. COTTIN,
Deputy.

Cross-interrogatories.

MANHATTAN LIFE-INSURANCE COMPANY *vs.* MAGEE & HALL. } Cross-interrogatories.

To A. L. Grabfelder, J. L. Halsey, and Riglander :

1st. Were you or either of you present when the bond was executed by Magee & Hall, the defts. ?

2nd. Did you or either of you have any conversation with Magee
40 & Hall, or either of them, before the bond was executed ? Did you have any conversation with either of them after the bond was signed by them ? If yea, when was it you had such conversation ? Where was it ? Did either of you ever have any conversation with Magee & Hall, or either of them, during the time Voorhees acted as agent of the plaintiffs ?

3rd. Had Henry Voorhees acted as agent of the plaintiff in Mobile previous to the giving of said bond ?

4th. Had he fully accounted for all monies he had previously received for the plaintiff, and paid it over ? If not, how much was he in arrears or indebted to the plaintiff at the time the bond was executed ? State particularly the amount then due & unpaid.

5th. How long did Voorhees act as agent of the company after giving the bond ? Would he have been continued in the employ of the plaintiff after his default, without giving bond & security ?

41 6th. Did you or either of you, at any time before the execution of the bond, or during the time Voorhees acted as plaintiff's agent, ever inform the defendants, Magee & Hall, that Voorhees was in arrear or default to the company before the bond was required of him ?

7th. Did you or either of you ever inform the defendants that it was agreed between Voorhees & the company, acting through its agent here, that he, Voorhees, should apply all his future commissions, after giving the bond, to his past indebtedness ? If yea, who was present at the time ?

Each of the witnesses will answer each interrogatory.
(Signed) E. S. DARGAN,
Atty. Defendants, Magee & Hall.

Filed May 1st, 1873.
(Signed) N. W. TRIMBLE, *Clerk.*

Commission.

UNITED STATES OF AMERICA:

Court of the United States for the fifth judicial circuit and southern district of Alabama.

42 THE MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE AND HENRY HALL.

To Hugh L. Cole, Moses B. Maclay, and Nicholas Murray, esqrs., greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you, or any of you, full power and authority to examine J. L. Halsey, Mr. Riglander, and A. L. Grabfelder, as witnesses in a cause pending in our said court, wherein the Manhattan Life-Insurance Company is plaintiff and Jacob Magee and Henry Hall are defendants.

And therefore we command you, or any of you, that, at such time and place that you, or either of you, may appoint, you do cause the said J. L. Halsey, Mr. Riglander, and A. L. Grabfelder to come before you, or either of you, and then and there examine them on oath as witnesses in the cause aforesaid, upon the interrogatories and cross-interrogatories hereto annexed; and that you, or either of you, do take such examination, and reduce the same into writing, and return the same an-
43 nexed to this writ, closed up under your seals, or the seal of any one of you, into our said circuit court, with all convenient speed.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the 2nd Monday of April, in the year of our Lord one thousand eight hundred and seventy-three.

U. S. CIR. COURT SEAL, SO. DIST. ALA.

Issued the 1st day of May, 1873.

Attest: (Signed) N. W. TRIMBLE,
Clk. C. C. Sou. Dis. Ala.

Evidence of J. L. Halsey.

Deposition of witnesses produced, sworn, and examined the 8th day of October, A. D. 1873, at number 2 Nassau street, in the city of New York, under and by virtue of a commission issued out of the hon. the United States circuit court for the fifth judicial circuit and southern district of Alabama, in a certain cause therein depending and at issue between the Mahattan Life-Insurance Company, plaintiffs, and Jacob Magee & Henry Hall, defendants, as follows.

JACOB L. HALSEY, of the city of New York, secretary of the
44 Manhattan Life-Insurance Company, aged forty-five years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First. To the first direct interrogatory he saith: The bond sued on in this case was sent to the plaintiffs by Henry V. H. Voorhees, in March, 1870, and it was in my custody, as secretary of the plaintiffs. I had no conversations with Mr. Voorhees nor with defendants as to same.

Second. To the second direct interrogatory he answers: I know that

Mr. Voorhees was in default, and owes money to the plaintiff for premiums collected by him as their agent. In March, 1872, we sent Mr. Riglander, one of our general agents, to get settlement with Voorhees. Voorhees' accounts, rendered to Mr. Riglander for the company at that time, shew the items collected, with the credits and amount of
45 admitted indebtedness on each, after he commenced to be in arrear to plaintiffs. These accounts were all handed to me by Mr. Riglander on his return to New York, in June, 1872. They are annexed, namely: One dated June, 1871, marked A, shewing a balance due the company of..... $1,163 49
One dated July, marked B, shewing a balance of..... 653 95
One dated August, marked C, shewing a balance of..... 188 43
One dated , marked D, shewing a balance of..... 752 88
One dated October, 1871, marked E, shewing a balance of.. 943 45
One dated November, 1871, marked F, shewing a balance of. 560 90

$4,263 10

in addition to which there was an indebtedness of $1,650.73, as shewn by account hereto annexed, marked G.

Third. To the third direct interrogatory he answers: I never saw Voorhees' books & accounts in company with defendants, & defendants never furnished plaintiffs with any account.

46 Fourth. To the 4th direct interrogatory he answers: I had no connection with taking the bond. It was sent on by mail to plaintiffs by Voorhees, duly executed. I never talked with defendants about it.

Fifth. To the fifth direct interrogatory he answers: I do not know of any fraud of any kind, & never heard of any in connection with procuring the bond.

Sixth. To the sixth direct interrogatory he answers: I know of nothing material not stated.

Cross-interrogatories.

First. To the first cross-interrogatory he answers and says: No.

Second. To the second cross-interrogatory he answers: No.

Third. To the third cross-interrogatory he answers: H. V. H. Voorhees had acted as agent for the plaintiffs previous to giving the bond.

47 Fourth. To the 4th cross-interrogatory he answers: He has not paid for all moneys he had received before the bond was executed. He owed plaintiffs at that time $3,744.98.

Fifth. To the fifth cross-interrogatory he answers: From March, 1870, to June, 1871; he would not have been continued as agent after his default in 1870, had he not furnished the bond.

6. To the sixth cross-interrogatory he answers: No; plaintiffs did not know anything about the procuring of the bond, as it was furnished them by Mr. Voorhees as before stated.

Seventh. To the 7th cross-interrogatory he answers: No; I never had any communication with defendants on any subject.

(Signed) J. L. HALSEY.

48 SEAL OF MOSES B. MACLAY, COMMISSIONER, &C., FOR ALABAMA IN NEW YORK. Examination taken, reduced to writing, and by the witness subscribed and sworn to this 8th day of October, 1873, before me.

(Signed) MOSES B. MACLAY,
Commissioner named in the annexed Commission.

A.

A.—*Monthly statement of receipts and disbursements on account of the Manhattan Life-Ins. Co. of New York, by Voorhees & Myers, June, 1871, agents at Mobile.*

DR

No. of policy.	To premiums and renewals received on policies. Name of insured.	How paid. Dividends.	Loan.	Cash.	Interest.	Commission.
17509	S. Parker	263 09	386 00 ✓	386 00 ✓	134 80 ✓	
17529	E. C. Kimcke	36 00	.....	115 60 ✓	.....	
17585	C. O. Bingham	90 00	.....	282 00 ✓	18 35 ✓	
17586	W. C. Hickey	61 00	96 50 ✓	96 50 ✓	18 75 ✓	
17631	J. R. Abrams	87 00	.....	273 00 ✓	21 05 ✓	
26116	E. F. Hellen	.....	.....	46 75 ✓	2 45 ✓	
17702	James Cobbs	.....	.....	*70 50	*49 10	
17703	Thos. Cobbs	.....	.....	*40 00	*27 90	
	(97)	✓	482 50	†1,199 85 ✓	*272 45	
				*1,310 35	195 40 ✓	
				482 50		
				272 45		
				$2,065 30		

CR.

See instructions on the other side.

Date.	By commission & charges.	Amount.		Policies and renewals not taken. No.	Premium.
	By postages	30			
	By two notes, $386.00 and $96.50	482 50			
	" dividend paid †17529, 1	36 00			
	" do. " †17586, 1	61 00			
	" remitted 22d Sept. to pay renewal †17702, $119.60	187 55			
	" do. do. do. do. †17703, 67.95.				
	" commissions on $1,792.85, a 7½	134 46			
	" balance	1,163 49			
		$2,065 30			
	By balance	.....	1,163 49		

* Erased. † In red ink.

Dated, 18
(Signed)

49

Instructions.

A full account of all receipts and authorized disbursements, on account of this company, must be made out and forwarded on the first of every month, accompanied with vouchers for expenses, and a bank-draft when procurable, for the cash balance, payable to "The Manhattan Life-Insurance Company, or order." The authorized charges are as follows:

1. Commission on the amount of first year's premiums.
2. Commission on the amount of renewal-premiums, (no commission to be charged for collecting interest on the loans or deferred premiums.)
3. Medical examiner's fees, for which his receipt must be enclosed, giving names of persons examined, and the numbers of policies.
4. Exchange on drafts and postage.
5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them.

Policies and renewal-receipts in hand, thirty days from their date, must be returned with the account, for cancellation.

A list of all policies, renewal-receipts, &c., remaining in the
50 hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:)

This is the statement ref'd to by me in my deposition as marked "A."
(Signed) J. L. HALSEY,
J. W. RIGLANDER.

(Signed) MOSES B. MACLAY, *Commissioner.*

B.

B.—*Monthly statement of receipts and disbursements on account of the Manhattan Life-Ins. Co of New York, by Voorhees & Myers, July, agents at Mobile, Ala.*

DR.

No. of policy.	To premiums and renewals received on policies. Name of insured.	How paid. Dividends.	Loan.	Cash.	Interest.	Extra premium.	Commission.
30739	E. L. Kimbrough	184 00		578 00 ✓			
21683	W. H. Ketchum	41 00		187 00 ✓			
26437	T. H. Lake	49 00		99 00 ✓			
15255	W. A. Buck	37 00		102 00 ✓			
15498	S. C. Beach	47 00		128 00 ✓			
25576	E. H. Grandin						
	Paid in N. York, $169.50. (358)			$1,094 00 ✓			

51 CR.

See instructions on the other side.

Date.	By commission and charges.	Amount.		Policies and renewals not taken. No.	Premium.
	By paid dividend, #30739	184 00			
	" " " 21683	41 00			
	" " " 26437	49 00			
	" " " 15255	37 00			
	" " " 15498	47 00			
	" commissions on $1,094 a 7½	82 05			
	" balance	653 95			
		$1,094 00			
	By balance		653 95		

Dated 18
(Signed)

Instructions.

A full account of all receipts and authorized disbursements on account of this company must be made out and forwarded on the first of every month, accompanied with vouchers for expenses, and a bank

draft, when procurable, for the cash balance, payable to the Manhattan Life-Insurance Company or order. The authorized charges are as follows:

1. Commission on the amount of first year's premiums.
2. Commission on the amount of renewal-premiums. (No commission to be charged for collecting interest on the loans or deferred premiums.)
3. Medical examiner's fees, for which his receipt must be enclosed, giving names of persons examined and the number of policies.
4. Exchange on drafts and postage.
5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them. Policies and renewal-receipts in hand, thirty days from their date, must be returned with the account for cancellation.

52

A list of all policies, renewal-receipts, &c., remaining in the hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:) This is the statement referred to by me in my deposition as marked "B."

(Signed) J. L. HALSEY,
" J. W. RIGLANDER.

(Signed) MOSES B. MACLAY, *Commr.*

C.] C.

Monthly statement of receipts and disbursements, on account of the Manhattan Life-Ins. Co., of New York, by Voorhees & Myers, August, agent' at Mobile.

53

DR.

No. of policy	Name of insured.	To premiums and renewals received on policies. Dividends.	How Paid. Loan.	Cash.	Interest.	Extra premium.	Commission.
18316	Chas. W. Locklin (99)	99 00	.....	311 00			

CR.

See instructions on other side.

Date.	By commission and charges.	Amount.		Policies and renewals not taken. No.	Premium.
	By postage	24			
	" dividend paid on policy *18316.	99 00			
	" commissions on $311 @ 7½	23 33			
	Balance	188 43			
		$311 00			
	By balance		188 43		

Instructions.

A full account of all receipts and authorized disbursements on account of this company must be made out and forwarded on the first of every month, accompanied with vouchers for expenses and a bank-draft, when procurable, for the cash balance, payable to the Manhattan Life-Insurance Company or order.

The authorized charges are as follows:

1. Commission on the amount of first year's premiums.

54 2. Commission on the amount of renewal premiums. (No commission to be charged for collecting interest on the loans or deferred premiums.)

3. Medical examiner's fees, for which his receipt must be enclosed, giving names of persons examined and the numbers of policies.

4. Exchange on drafts and postage.

5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them.

Policies and renewal-receipts in hand thirty days from their date must be returned with the account for cancellation.

A list of all policies, renewal-receipts, &c., remaining in the hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:)

This is the statement referred to in my desposition as marked "C."

(Signed) J. L. HALSEY,
" J. W. RIGLANDER.

(Signed) MOSES B. MACLAY,
Comm'r.

55 D.] D.

Monthly statement of receipts and disbursements on account of the Manhattan Life-Ins. Co., of New York. By Voorhees & Myers, agent', at Mobile, Ala.

DR.

No of policy.	To premiums and renewals received on policies. Name of insured.	How paid. Dividends.	Loan.	Cash.	Interest.	Extra premium.	Commission.
25977	W. T. Jones	$9 00		57 75 ✓			
22978	G. F. Macmurdo	116 10	248 25 ✓	248 25 ✓	74 00 ✓		
20565	A. E. Ledyard	126 61		200 50 ✓	63 60 ✓		
22222	T. S. Fry	26 63	59 00 ✓	59 00 ✓	17 65 ✓		
22322	A. P. Hall	27 00		125 00 ✓			
22346	G. A. Moses	25 56	56 00 ✓	56 00 ✓	16 75 ✓		
17702	Jas. Cobbs	95 85	141 00 ✓	70 50 ✓	1 27 ✓		
17703	Thos. Cobbs	54 32	80 00 ✓	40 00 ✓	71 ✓		
			584 ✓ 25	857 ✓ 00	173 ✓ 98		
	Int			173 98			
	Notes			584 25			
				$1,615 23			

56 (156 6.5)

56 CR.

See instructions on the other side.

Date.	By commission and charges.	Amount.		Policies and renewals not taken.	
				No.	Premium.
	To paid probate court filing stacement	7 50		18770	$192 75
	" " dividend policy # 25977	9 00		22367	404 15
	" " do. " 20565	126 51			
	" " do. " 22322	27 00			
	" note for policy " 22978	248 25			
	" " " " 22222	59 00			
	" " " " 22346	56 00			
	" " " " 17702	141 00			
	" " " " 17703	80 00			
	" Commission % on $1,441 25	108 09			
	" Balance	752 88			
		$1,615 23			
	By balance		$752 88		

Dated 18. (Signed)

Instructions.

A full account of all receipts and authorized disbursements on account of this company must be made out and forwarded on the first of every month, accompanied with vouchers for expenses, and a bank-draft, when procurable, for the cash balance, payable to The Manhattan Life-Insurance Company or order.

The authorized charges are as follows:

1. Commission on the amount of first year's premiums.

2. Commission on the amount of renewal premiums. (No
57 commission to be charged for collecting interest on the loans or dueferred premims.)

3. Medical examiner's fees, for which his receipt must be enclosed, giving names of persons examined and the numbers of policies.

4. Exchange on drafts and postage.

5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them.

Policies and renewal-receipts in hand, thirty days from their date, must be returned with the account for cancellation.

A list of all policies, renewal-receipts, &c., remaining in the hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:)

This is the statement referred to in my deposition as marked "D."

(Signed) J. L. HALSEY.

(") J. W. RIGLANDER.

(Signed) MOSES B. MACLAY, *Comm'r.*

58 E.] E.

Monthly statement of receipts and disbursement on account of the Manhattan Life-Ins. Co. of New York, by Voorhees & Myers, agent' at Mobile, for Oct., 1871.

DR.

No. of policy.	To premiums and renewals received on policies. Name of insured.	How paid. Dividends.	Loan.	Cash.	Interest.	Extra premium.	Commissions.
22477	Jno. Cortwright	*82 00		373 00 ✓	12 20 ✓		
			†56 07 ✓				
22478	E. B. Lott	47 93 ✓	*104 00 ✓	104 00 ✓	24 25 ✓		
			†45 57 ✓				
19008	J. T. Taylor	96 93 ✓	*142 50 ✓	142 50 ✓	21 95 ✓		
			†53 80 ✓				
22551	Do	45 80 ✓	*99 60 ✓	99 60 ✓	16 75 ✓		
			†43 83 ✓				
19035	A. G. Shepherd	92 67 ✓	*136 50 ✓	136 50 ✓	47 75 ✓		
19088	G. M. Parker	*119 00		*374 00			
19179	H. P. Snow	*52 00		*165 50			
19222	Rob. Middleton	*35 15		105 50 ✓	8 19 ✓		
	3,41		482 60	*1,500 60	131 09 ✓		
	*266 17.33			*131 09			
				*482 60			
				*$2,114 29			
		†283 33 ✓	†199 27 ✓	†961 10 ✓	†131 09 ✓		

* Erased. † In red ink.

59 CR.

See instructions on the other side.

Date.	By commission and charges.		Amount.	Policies and renewals not taken. No.	Premium.
1871. Oct.	Note for policy 22478, $56.07, dividend	$47 93	104 00		
	" " " 19008, $45.57, "	96 93	142 50		
	" " " 22561, $53.80, "	45 80	99 60		
	" " " 19035, $43.83, "	92 67	136 50		
	Paid in N. York, 19088		374 00		
	Paid " do. 19179		165 50		
	Commission 7½ % on $1,983.20 ✓ *		148 74		
	Bal'c due Manhattan Life-Ins. Co.		943 45		
			$2,114 29		

Date 18— (Signed)

* In red ink.

Instructions.

A full account of all receipts and authorized disbursements on account of this company must be made out and forwarded on the first of every month, accompanied with vouchers for expenses, and a bank-draft, when procurable, for the cash balance payable to The Manhattan Life-Insurance Company or order.

The authorized charges are as follows:

1. Commission on the amount of first year's premiums.
2. Commission on the amount of renewal-premiums. (No commission to be charged for collecting interest on the loans or deferred premiums.)
3. Medical examiner's fees, for which his receipts must be enclosed, giving names of persons examined and the numbers of policies.
4. Exchange on drafts and postage.
5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them.

Policies and renewal-receipts in hand, thirty days from their date, must be returned with the account for cancellation.

A list of all policies, renewal-receipts, &c., remaining in the hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:)

This is the statement referred to in my deposition as marked "E."

(Signed) J. S. HALSEY.
" J. W. RIGLANDER.

(Signed) MOSES B. MACLAY, *Comm'r.*

F.] F.

Monthly statement of receipts and disbursements on account of the Manhattan Life-Ins. Co. of New York, by Voorhees & Myers, agent' at Mobile, Novem., '71.

DR.

61	To premiums and renewals received on policies.	How paid.					
No. of policy.	Name of insured.	Dividends.	Loan.	Cash.	Interest.	Extra premium.	Commission.
19293	Jno. Forsyth	186 40✓	†88 10 *274 50✓	274 50✓	78 05✓		
19377	Thos. Reid	*23 00		74 80✓			
19378	Jno. L. Cotton	*69 00		217 50✓			
22991	J. A. Massey	52 19✓	†61 31 *113 50✓	113 50✓	26 45✓		
19502	Jno. W. Stockley	108 64✓	†51 36 *160 10✓	160 00✓	55 95✓		
22476	J. R. Malone	8 52✓	†9 58 *18 10✓	18 10✓	5 40✓		
			*566 10	*858 40 *566 10 *165 85	*165 85		
	(4.26 21.75)			*$1,590 35			
		†355 75✓	†210 35✓	†858 40✓	†165 85✓		

* Erased. † In red ink.

CR.

See instructions on the other side.

Date.	By commission and charges.	Amount.		Policies and renewals not taken.	
				No.	Premiums.
	Note for policy 19293, $88.10; dividend, $186.40	274 50		*26581	102 00
	" " " 22991, 61.31; " 52.19	113 50			
	" " " 19502, 51.36; " 108.64	160 00			
	" " " 22476, 9.58; " 852	18 10			
	" paid dividend policy *19,377	23 00			
	" " " " " 19,378	69 00			
	" paid settlement for policy of W. S. Nimoch	101 92			
	" surrender " " W. S. McNiel	157 60			
	Commission 7½ % on $1,424.50	106 83			
	Paid express on package shew cards	5 00			
	Balc. due Manhattan	560 90			
		$1,590 35	560 90		
	Balc. due Manhattan Life				

* This policy is to be changed to one in favor of wife.

Dated , 18 , (Signed.)

62 *Instructions.*

A full account of all receipts and authorized disbursements on account of this company must be made out and forwarded on the first of every month, accompanied with vouchers for expenses, and a bank-draft, when procurable, for the cash balance, payable to the Manhattan Life-Insurance Company or order.

The authorized charges are as follows:

1. Commission on the amount of first year's premiums.
2. Commission on the amount of renewal-premiums. (No commission to be charged for collecting interest on the loans or deferred premiums.)
3. Medical examiner's fees, for which his receipt must be enclosed, giving names of persons examined and the numbers of policies.
4. Exchange on drafts and postage.
5. Other charges (if any) previously authorized by the company, with dates of letters authorizing them.

Policies and renewal-receipts in hand, thirty days from their date, must be returned with the account for cancellation.

63 A list of all policies, renewal-receipts, &c., remaining in the hands of the agent, not paid for at the date of the account, must be made out in the two right-hand columns of the account.

(Endorsed:)

This is the statement referred to in my deposition as marked "F."

(Signed) J. L. HALSEY.

(") J. W. RIGLANDER.

(Signed) MOSES B. MACLAY, *Comm'r.*

G.] G.

Manhattan Life-Ins. Co. in account with H. V. H. Voorhees.

1869.			
Dec. 31.	By balance due Manhattan Life-Ins. Co		$3,881 47
" "	To am't remitted co. on miss. a/c	11 25	
1870.			
Feb'y 17.	" " " " for Jan'y	61 76	
Mch. 1.	" " " " " Feb'y	63 48	
			136 49
			$3,744 98

Apl.	8.	"	"	"	"	"	March	256 59	
May	7.	"	"	"	"	"	April	206 33	
June	14.	"	"	"	"	"	May	233 66	
July	6.	"	"	"	"	"	June	162 15	
Aug.	2.	"	"	"	"	"	July	82 57	
Sept.	3.	"	"	"	"	"	Aug	36 04	
Oct.	21.	"	"	"	"	"	Sept	155 98	
Nov.	16.	"	"	"	"	"	Oct	184 32	
Dec.	19.	"	"	"	"	"	Nov	69 92	
	27.	"	"	"	"	"	Dec	57 13	
	31.	"	"	"	"	"	"	17 03	
1871.									
Feb'y	7.	"	"	"	"	"	Jan'y	54 67	
	Mch.	16.	"	"	"	"	Feb'y	66 19	
64	Apl.	27.	"	"	"	"	Mch	$249 49	
	June	21.	"	"	"	"	April	262 18	
									2,094 25
									$1,650 73

This is the statement referred to by me in my deposition as marked "G."

(Signed) J. L. HALSEY.
" ABRAHAM L. GRABFELDER.
" J. W. RIGLANDER.
(Signed) MOSES B. MACLAY, *Comm'r.*

H.] H.

The Manhattan Life-Ins. Co. in account with H. V. H. Voorhees, Cr.

1871.											
June	30.	By balance due company on collections of						May,	as per report		$1,163 45
July	31.	"	"	"	"	"	"	June,	"	"	653 98
Aug.	31.	"	"	"	"	"	"	July,	"	"	188 45
Sept.	30.	"	"	"	"	"	"	Aug.,	"	"	752 80
Oct.	31.	"	"	"	"	"	"	Sept.,	"	"	943 43
Nov.	30.	"	"	"	"	"	"	Oct.,	"	"	560 99
											$4,263 10

This is the statement referred to in my deposition as marked "H."

(Signed) J. L. HALSEY.
" ABRAHAM L. GRABFELDER.
" J. W. RIGLANDER.
(Signed) MOSES B. MACLAY, *Comm'r.*

65 *Evidence of J. W. Riglander.*

JACOB W. RIGLANDER, of the city of New York, general insurance agent, aged years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose as follows:

First. To the first direct interrogatory he answers: In March, 1872, I was in Mobile, and at that time received a statement of account due the Manhattan Life-Insurance Company by H. V. H. Voorhees. At the same time received the bond sued on in this case from Mr. J. L. Halsey, the secretary of the company. I then called on H. V. H. Voorhees and demanded payment for the amount due the company for premiums collected by him. At same time he informed me that he could not pay it, as he had no means. He then arranged a meeting with defendants, Messrs. Magee & Hall, for me, and I demanded payment from them for the deficit of Voorhees, as his bondsmen on the bond sued for in

66 this case. After we had several meetings they offered a compromise, which I declined to accept.

Second. To the second direct interrogatory he answers: Yes. Mr. Voorhees was in default by failing to pay over monies collected by him for said company during his agency. The accounts annexed to the deposition of J. L. Halsey, herein marked "A," "B," "C," "D," "E," "F," & "G" & "H," shew the amount of his deficit. They were taken from Mr. Voorhees' monthly reports, made as agent during his employment, which he gave me in March, 1872, the company never having seen the same until I delivered them on my return to New York in June, 1872; besides I examined Mr. Voorhees' books & compared them; and, in addition to this, and in my frequent conferences with Mr. Voorhees, he has always admitted these accounts as correct. The account as made out by the company is something larger than this, but the difference was not much, and the exhibits are in accordance with Mr. Voorhees' own statement, and after allowing him all he claimed. The account attached as

67 Exhibit G shews the receipts & credits up to June, 1871, leaving a balance of $1,650.73. Account marked "H" shews the deficit since June, 1871, with the time and amount of each default, amounting to $4,263.10. I have also talked to defendants five or six times. They examined the accounts, & they never disputed the amounts as specified in the accounts, but would not pay.

Third. To the third direct interrogatory he answers: I examined the books of H. V. H. Voorhees with his assistance, never with defendants. I never was furnished with any accounts by defendants.

Fourth. To the fourth direct interrogatory he answers: I had nothing to do with the making of the bond. I was not at the time connected with the company.

Fifth. To the fifth direct interrogatory he answers: I know of

68 no fraud. The defendants never set up fraud as a defence to me.

Sixth. To the 6th direct interrogatory he answers: The defendants & I had a good many meetings in March, 1872, and I tried my best to get them to pay the amount due the company, and at that time they offered me a compromise—the amount I do not remember.

Cross-interrogatories:

First. To the first cross-interrogatory he saith: No.

Second. To the second cross-interrogatory he answers: No; not before; but I had when I demanded payment of same. I had none while he acted as agent.

Third. To the third cross-interrogatory he answers: Yes.

Fourth. To the 4th cross-interrogatory he answers: No. He owed the company up to March, 1870, thirty-seven hundred & forty-four

69 & $\frac{98}{100}$ dollars ($3,744.98) as account marked "G" will shew, which was subsequently reduced to $1,650.73 up to April, 1871.

Fifth. To the fifth cross-interrogatory he answers: I do not know.

Sixth. To the sixth cross-interrogatory he answers: I never saw them, nor knew them, nor did I know that such a bond was in existence previous to March, 1872.

Seventh. To the seventh cross-interrogatory he answers: No.

(Signed) J. W. RIGLANDER.

SEAL OF MOSES B. MACLAY, COMMISSIONER, &C., FOR ALABAMA, IN NEW YORK.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 8th day of October, A. D. 1873, before me.

(Signed) MOSES B. MACLAY,
Commissioner named in the annexed Commission.

70 *Evidence of A. L. Grabfelder.*

ABRAHAM L. GRABFELDER, of the city of New York, insurance agent, aged thirty-five years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose & say as follows:

First. To the first direct interrogatory he answers: I have seen it, and had it in October, 1872, when I saw H. V. H. Voorhees & the defendants, Magee & Hall, as to the default of Voorhees to the Manhattan Life-Insurance Company. I had conversations with Voorhees and Mr. Magee, one of the defendants, at that time in relation to the said default & the company's claim under the bond. I demanded payment of same. I acted as general agent of the company in the matter. Voorhees acknowledged the indebtedness of $4,263.10, accrued since June, 1871, and an indebtedness of $1,650.73, accruing previous thereto, & furnished me with a statement of same. Voorhees arranged a subsequent meeting of myself with Magee & Hall. When I met them

71 Voorhees was not present. I met them at Hall's office. I demanded the payment of the amount of the bond, which they refused to pay, but asked a short delay of further action in the matter until they could consult their attorney as to their liability under the bond. Messrs. Magee & Hall told me that at the time the bond was given they did not see any one representing the company, but that Mr. Voorhees himself came to them and requested them to become his bondsmen to enable him to keep his agency. Messrs. Hall & Magee, in the conversation, told me that they knew when they gave the bond, that Mr. Voorhees had been for several years the agent of the company. Mr. Magee said that Voorhees told them that, to enable him to continue the agency, he was required to give a bond, with two good sureties, & asked them to be such sureties, which they did willingly, in order to assist Mr. Voorhees in making a living, knowing that he had failed in business. On an interview with them the next day they refused to pay the amount claimed.

72 Second. To the second direct interrogatory he answers: Mr. Voorhees admitted default in his accounts to the company to the amount of $5,913.83. The company claimed more than that amount, viz, $6,069.32. The items of this statement were furnished me by the company. Mr. Voorhees compared the statement I had from the company, and admitted the correctness of the ones marked "G" and "H," annexed to the deposition of Jacob L. Halsey herein, shewing an indebtedness of $5,913.83.

Third. To the third direct interrogatory he answers: I did not compare the said accounts with the books of Mr. Voorhees, as he admitted the same to be correct as to the ones marked "G" and "H." Mr. Hall, one of the defendants, shewed me an account which he said was a correct statement, furnished him by Voorhees, of the amount of indebtedness to the company. He allowed me to copy the same, & same is hereto annexed marked "G" & "H."

73 Fourth. To the 4th direct interrogatory he answers: I was not connected with the company when bond was given, and know nothing about the making of the bond. The defendants told me they never had any conversation with & had not seen or known any one representing the company, but only with Voorhees, at & before giving said bond.

Fifth. To the fifth direct interrogatory he answers: I know of no

fraud on the part of the company, & defendants never set up fraud in connection with the matter.

Sixth. To the 6th direct interrogatory he answers: I know of nothing not before stated.

Cross-interrogatories:

First. To the first cross-interrogatory he answers: No.

Second. To the second cross-interrogatory he answers: I had no conversation with defendants before the bond was executed.
74 I saw them in October, 1872, about same. I presented & demanded payment on same at the office of Mr. Hall, in Mobile, Alabama. Both Magee & Hall were then and there present. I never had any conversation with them before that time.

Third. To the third cross-interrogatory he answers: Yes.

Fourth. To the 4th cross-interrogatory he answers: Voorhees told me he owed thirty-seven hundred & forty-four dollars & ninety-eight cents, ($3,744.98) when he gave the bond, and that since that time, and before he got in default to the company, he had paid off $2,094.25 on account of same, leaving $1,650.73 due on same in April, 1871.

Fifth. To the fifth cross-interrogatory he answers: I do not know how long he acted as agent after he gave the bond, nor do I know whether he would have been continued as agent by the company, after his default, without giving bond & security.

75 Sixth. To the sixth cross-interrogatory he answers: I had nothing to do with the procuring of the bond. Was not in the employ of the company at that time. Did not know anything about it previous to 1872, save what defendants told me themselves, as previously testified by me.

Seventh. To the 7th cross-interrogatory he answers: No, I never did.

(Signed) ABRAHAM L. GRABFELDER.

{SEAL OF MOSES B. MACLAY, COMMISSIONER, &C., FOR ALABAMA IN NEW YORK.} Examination taken, reduced to writing, and by the witness subscribed & sworn to this 8th day of October, 1873, before me.

(Signed) MOSES B. MACLAY,
Commissioner named in annexed Commission.

Bond.

Know all men by these presents that we, Henry V. H. Voorhees, as principal, and Jacob Magee & Henry Hall, suretys, of the town
76 of Mobile, county of Mobile, State of Alabama, are held and firmly bound unto The Manhattan Life-Insurance Company of the city of New York in the sum of five thousand dollars, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated this second day of March, one thousand eight hundred and seventy.

The condition of this obligation is such that if the above bounden Henry V. H. Voorhees, who has been appointed an agent of the said The Manhattan Life-Insurance Company, shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from the said The Manhattan Life-Insurance Company, and shall, on the first day of each month, remit to the office of said com-

pany all moneys received by him (not previously remitted) as such agent, less his commission, together with his account of the same, then the above obligation to be void; otherwise, to remain in full force and virtue.

(Signed) HENRY V. H. VOORHEES.
" JACOB MAGEE.
" HENRY HALL.

Sealed and delivered in the presence of—
(Signed) PIERCE C. BUTLER.

[50 cents U. S. int. revenue stamp, canceled. March 2, 1870.]

77 *Direct interrogatories to H. V. H. Voorhees.*

In the circuit court of the United States at Mobile.

MANHATTAN LIFE-INSURANCE COMPANY
vs.
JACOB MAGEE & HENRY HALL.

Direct interrogatories to be propounded to Henry V. H. Voorhees, a material witness for the defendants in above-entitled cause pending in said circuit court.

Int. 1. How old are you, and where do you reside? What is your occupation or employment? Have you a family, or are you a single man? If you say you have a family, then state how many in your family.

Int. 2. Do you know the subject matter of this suit? Who is the principal in the bond sued on?

Int. 3. Were you the agent of the plaintiffs before giving the bond sued on? How long had you been the agent of the plaintiffs in Mobile before you gave the bond on March 2nd, 1870? If you state you
78 were the agent of plaintiffs, had you become indebted to the plaintiffs as such agent, and to what amount? Did you ever give any bond to the plaintiffs until you gave the bond sued on?

Int. 4. State whether the plaintiffs would have continued you as agent at Mobile without bond and security, and what agreement was entered into by you and the company as to your future earnings, or commissions, and whether such agreement was verbal or in writing. Be particular and give the exact terms of it, if it was verbal.

Int. 5. Did you inform Magee and Hall, or either of them, before they signed the bond, that you were behindhand with the company, or of the agreement enquired of above?

Int. 6. When did Magee and Hall first learn of the agreement aforesaid, or that you had become indebted to the plaintiffs before the bond was executed by them? Did they obtain knowledge of either of
79 those facts while you acted as agent of the plaintiffs?

Int. 7. State the exact amount of money received in plaintiff's business after the bond was given. How much of this amount did you remit to the plaintiffs?

Int. 8. How much of this amount received by you, after the bond was given, belonged to you for commission or compensation? How much to the plaintiffs?

Int. 9. What amount of your commissions, received by you after the bond was executed, did you remit to plaintiffs; & why was such remittance made? State fully whether such remittance was in pursuance of

agreement entered into before the bond was given, or whether it was done independent of said agreement.

Int. 10. Who was the agent of the company with whom you dealt in giving the bond and making the agreement aforesaid? Who
80 first spoke of your paying your future earnings or commissions to the payment of your past or then existing indebtedness to the company? Would the plaintiffs have retained you in their employment if you had refused to agree to apply your future earnings to your past indebtedness.

Int. 11. State fully the terms and conditions on which you were retained in plaintiff's employment; and whether your securities knew of or were informed of the terms on which you were retained?

Int. 12. What were the reasons or inducements for Hall and Magee to go on your bond. What were your means of supporting your family? Did you have the means of supporting them other than your labor or your employment?

Int. 13. How long did the agent of the plaintiffs remain in Mo-
81 bile arranging things for you to continue in plaintiffs' employment? Where was the bond you gave prepared? Was it written in Mobile, or was it sent out from New York? Do you know of any correspondence between the plaintiffs' agent and the company (the plaintiffs) during the time of arranging the matters for you to continue in office? If yea, state if you know the character of such correspondence?

Int. 14. How did you obtain the money since the second of March, 1870, which you paid upon the debt you owed to the company when you gave the bond?

Int. 15. State any other fact within your knowledge that may be of benefit to the defendants.

(Signed) DARGAN & DESHON,
Atty. for Defts.

We suggest James Gillette, a commissioner of this court, as a proper person to examine the witness, (as commissioner,) Henry H. V. Voorhees, & to take his testimony.

(Signed) DARGAN & DESHON,
For Defts.

82 Filed May 7th, 1873.

(Signed) N. W. TRIMBLE, *Clerk.*

(Endorsed:)

Rec'd May 8th, 1873, and executed same day by serving a copy of the within interrogatories on John T. Taylor.

(Signed) R. W. HEALY,
U. S. Marshal.
By GEO. COTTIN,
Deputy.

Cross-interrogatories to H. V. H. Voorhees.

MANHATTAN LIFE-INS. CO.
vs.
JACOB MAGEE, HENRY HALL.

Cross-ints. and objections to interrogatories propounded to H. V. H. Voorhees, witness for dft.

Plaintiff objects to int. 1, 4, 5, 6, 8, 9, 10, and 12, because irrelevant

and illegal, and the evidence sought is irrelevant, and not material to any of the issues joined.

And plaintiff objects to that part of the 13th int. which asks for the correspondence between the plaintiff and its agents, because this
83 evidence sought is not the best evidence, is parol, and is illegal and irrelevant.

Subject to these exceptions, and not traversing the same, the following cross-ints. are put:

1. Did you ever in any way practice any fraud, misrepresentation or deceit in any way, intentionally on these defendants? and, if you did, state for what purpose and what was it.

2. Did you not simply tell the defendants that it was necessary, to retain your office, that you should give bond, and ask them to go on it? Was any questions asked about your condition or accounts? Did they not know that you had previously been acting as such agent? Was there any falsehood or misrepresentation, or fraudulent concealment made by you to them? Now, if you say there was, state it.

3. Did the plaintiffs, or *his* agent ever have any conversation
84 with your securities at the time, or did they know who you were going to get as securities? Did they know anything of the private talk or negotiations between you and your securities, or how, or wherefore, you got them to go on your bond?

4. Did not the plaintiffs simply require of you bond and security, and did not the agent at your request furnish you with the form of a bond which they said would be sufficient? Was it not a printed form, and such as they took in all other cases?

5. Was there ever an understanding or agreement, or suggestion in any manner, word or action, on the part of plaintiffs, or its agent, that *that* you should practice any fraud, misrepresentation, or deceit, in any way, on any body, in order to get them to go on your bond? If so, state when, where, and with whom such an agreement was made, and what it was.

6. Did you not simply give the agent the names you intended
85 sureties, and when he approved of them did you not afterwards forward the bond to New York?

8. Did you not state to Mr. Pleasants, and also write to plaintiff at the time of giving the bond, "That you were then doing a business, with increased prospects, which would enable you gradually to liquidate the whole debt; that you then had in hand an order from Liverpool for 1,800 bales of cotton, and you would continue to remit portions of your commissions, until your debt was gradually paid?" Was not this about all that was ever said or done in relation to your commissions?

7. Was it not a voluntary promise on your part to remit your commissions? Was there any written contract in which such an agreement was embraced?

8. Was not the several items of commissions with which your account is credited, between 2 March, 1870, to June 21, '71, forwarded by you, with instructions to apply to your indebtedness?

9. If, in answer to defendants' interrogatories, you state the
86 amount of money forwarded plaintiff, state the dates of each remittance in every case, and state all the debits and credits.

10. Did not plaintiff's agent and defendants, or one of them, call on you for a statement from your books showing the amounts due from you, with dates, times, & amounts? Did you not make out and hand to them such statements? Did you not make out the two in separate forms to suit them? And is not the annexed exhibit a true copy of

what was furnished by you? *Is* not these accounts correct in amount and dates? Did not said parties look at your books—have access to them? Did not they agree that the amounts & dates was correct, but differed only about the application of the commissions and credits?

11. Please state the several amounts collected by you since the 2nd day of March, 1871, and not paid over to plaintiffs, and give the dates & separate sums.

Is not the annexed account, marked No. 2, a correct ac. of it?

87 Examine your books and state the facts.

Is not all the commissions and money sent to plaintiffs by you before and since the date of said bond correctly stated in Exhibit No. 1?

12. Please state any other fact known to you that may be important to either side.

(Signed) TAYLOR & MACARTNEYS,
For Plft.

NOTE.—Plaintiff demands notice of the time and place of examining this witness.

(Signed) TAYLOR & MACARTNEYS,
For Plft.

No. 1.] NO. 1.—EXHIBIT A[1].

Manhattan Life-Ins. Co. in ac. with H. V. H. Voorhees.

Dec. 31.			
1869.	By balance due Manht. Ins. Co		$3,881 47
"	To amts. remitted		
1870.	Coms. on miss. ac	11 25	
Feb'y 17.	Coms. for Jan'y	61 76	
Mch. 1.	" " Feb'ry	63 48	
			136 49
	Bal. due com		$3,744 98
1870.			
April 8.	Coms. for March	$256 59	
Mch. 7.	" " April	206 33	
June 14.	" " May	233 66	
88 July 6.	Coms. for June	$162 15	
Aug. 2.	" " July	82 57	
Sept. 3.	" " Augt	36 04	
Oct. 21.	" " Sept	155 98	
Nov'r 16.	" " Oct	184 32	
Dec. 19.	" " Nov'r	69 92	
" 27.	" " Dec'r	57 13	
31.	" " "	17 03	
1871.			
Feb'y 7.	" " Jan'y	54 67	
Mch. 16.	" " Feb'ry	66 19	
April 27.	" " March	249 49	
June 21.	" " April	262 18	
			2,094 25
	Bal. due June 21, '71		$1,650 73

No. 2.] No. 2.—A²

Manhattan Life-Ins. Co. in act. with H. V. H. Voorhees.

1871.				
June 30.	By balance due Manhattan Life for amts. collected this month			$1,163 49
July 31.	"	do.	do.	653 95
Aug't 31.		do.	do.	188 43
Sept. 30.		do.	do.	752 88
Oct'r 31.		do.	do.	943 45
Nov'r 31.		do.	do.	560 90
				$4,263 10

Amt. of coms. due Voorhees remitted, as charged on preceding page, from Apl. 8, '70, to June 21, '71	$2,094 25	
Cash paid Riglander	25 00	
		$2,119 25
		$2,043 85

89 Filed May 23, 1873.
(Signed) N. W. TRIMBLE, *Clerk.*

Commission.

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

MANHATTAN LIFE-INS. CO.
vs.
JACOB MAGEE AND HENRY HALL.

To James Gillette, esq., greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you full power and authority, to examine Henry V. H. Voorhees as witness in a cause pending in our said court, wherein the Manhattan Life-Insurance Company are plaintiffs and Jacob Magee and Henry Hall defendants.

And therefore we command you, or any of you, that at such time and place, or times and places, as you may appoint, you do cause the said Henry V. H. Voorhees to come before you, or either of you, and then
90 and there examine him on oath as a witness in the cause aforesaid upon the interrogatories and cross-interrogatories hereto annexed. And that you do take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seals, into our said circuit court, with all convenient speed.

SEAL OF U. S. CIRCUIT COURT SO. DIST. OF ALA.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the 2nd Monday of April, in the year of our Lord one thousand eight hundred and seventy-three.

Issued the 26th day of May, 1873.

Attest:
(Signed) N. W. TRIMBLE,
Clk. C. C., Sou. Dis. Ala.

NOTE.—Plaintiffs demand notice of the time and place of examination.

what was furnished by you? *Is* not these accounts correct in amount and dates? Did not said parties look at your books—have access to them? Did not they agree that the amounts & dates was correct, but differed only about the application of the commissions and credits?

11. Please state the several amounts collected by you since the 2nd day of March, 1871, and not paid over to plaintiffs, and give the dates & separate sums.

Is not the annexed account, marked No. 2, a correct ac. of it?

87 Examine your books and state the facts.

Is not all the commissions and money sent to plaintiffs by you before and since the date of said bond correctly stated in Exhibit No. 1?

12. Please state any other fact known to you that may be important to either side.

(Signed) TAYLOR & MACARTNEYS,
For Plft.

NOTE.—Plaintiff demands notice of the time and place of examining this witness.

(Signed) TAYLOR & MACARTNEYS,
For Plft.

No. 1.] No. 1.—EXHIBIT A[1].

Manhattan Life-Ins. Co. in ac. with H. V. H. Voorhees.

Dec. 31.			
1869.	By balance due Manht. Ins. Co		$3,881 47
"	To amts. remitted		
1870.	Coms. on miss. ac	11 25	
Feb'y 17.	Coms. for Jan'y	61 76	
Mch. 1.	" " Feb'ry	63 48	
			136 49
	Bal. due com		$3,744 98
1870.			
April 8.	Coms. for March	$256 59	
Mch. 7.	" " April	206 33	
June 14.	" " May	233 66	
88 July 6.	Coms. for June	$162 15	
Aug. 2.	" " July	82 57	
Sept. 3.	" " Augt	36 04	
Oct. 21.	" " Sept	155 98	
Nov'r 16.	" " Oct	184 32	
Dec. 19.	" " Nov'r	69 92	
" 27.	" " Dec'r	57 13	
31.	" " "	17 03	
1871.			
Feb'y 7.	" " Jan'y	54 67	
Mch. 16.	" " Feb'ry	66 19	
April 27.	" " March	249 49	
June 21.	" " April	262 18	
			2,094 25
	Bal. due June 21, '71		$1,650 73

No. 2.] No. 2.—A²

Manhattan Life-Ins. Co. in act. with H. V. H. Voorhees.

1871.				
June 30.	By balance due Manhattan Lite for amts. collected this month			$1,163 49
July 31.	"	do.	do.	653 95
Aug't 31.		do.	do.	188 43
Sept. 30.		do.	do.	752 88
Oct'r 31.		do.	do.	943 45
Nov'r 31.		do.	do.	560 90
				$4,263 10

Amt. of coms. due Voorhees remitted, as charged on preceding page, from Apl. 8, '70, to June 21, '71	$2,094 25	
Cash paid Riglander	25 00	
		$2,119 25
		$2,043 85

89 Filed May 23, 1873.
(Signed) N. W. TRIMBLE, *Clerk.*

Commission.

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

MANHATTAN LIFE-INS. CO.
vs.
JACOB MAGEE AND HENRY HALL.

To James Gillette, esq., greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you full power and authority, to examine Henry V. H. Voorhees as witness in a cause pending in our said court, wherein the Manhattan Life-Insurance Company are plaintiffs and Jacob Magee and Henry Hall defendants.

And therefore we command you, or any of you, that at such time and place, or times and places, as you may appoint, you do cause the said Henry V. H. Voorhees to come before you, or either of you, and then and there examine him on oath as a witness in the cause
90 aforesaid upon the interrogatories and cross-interrogatories hereto annexed. And that you do take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seals, into our said circuit court, with all convenient speed.

SEAL OF U. S. CIRCUIT COURT SO. DIST. OF ALA.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, the 2nd Monday of April, in the year of our Lord one thousand eight hundred and seventy-three.

Issued the 26th day of May, 1873.

Attest:
(Signed) N. W. TRIMBLE,
Clk. C. C., Sou. Dis. Ala.

NOTE.—Plaintiffs demand notice of the time and place of examination.

Evidence of H. V. H. Voorhees.

UNITED STATES OF AMERICA,
Southern District of Alabama, ss:

Be it remembered that on this thirtieth (30th) day of July, A. D. 1873, I, James Gillette, a commissioner, duly appointed by the circuit
91 court of the United States for the southern district of Alabama, and fifth circuit, by virtue of the commission issued out of said court, which commission is hereto annexed, did call and cause to be and personally appear before me, at the office of the clerk of the United States courts in the custom-house, in the city of Mobile, in the southern district of Alabama, Henry V. H. Voorhees, to testify and the truth to say, on the part and behalf of the defendants in a certain suit pending and undetermined in the circuit court of the United States for the fifth judicial circuit, southern district of Alabama, wherein the Manhattan Life-Insurance Company is plaintiff and Jacob Magee and Henry Hall are defendants.

And the said HENRY V. H. VOORHEES, having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy aforesaid, did thereupon depose and testify as follows:

Answers to interrogatories.

92 1. To the first interrogatory, he saith: Sixty-eight years. I reside in Mobile. Book-keeper. I have a family, a wife and two children.

2. To the second interrogatory, he saith: I know all about this suit. I am the original principal in the bond sued on.

3. To the third interrogatory, he saith: I was the agent of the plaintiffs before giving the bond sued on. I had been the agent of the plaintiffs between four and five years prior to March 2nd, 1870. I had become indebted to the plaintiffs, as such agent, to the amount of three thousand eight hundred and eighty-one & $\frac{47}{100}$ dollars. I never gave any bond to the plaintiffs until I gave the bond sued on.

4. To the fourth interrogatory, he saith: The plaintiffs would not have continued me as agent without bond and security. The agreement was that the future earnings or commissions were to be returned to the company. I cannot say positively whether such agreement
93 was verbal or in writing. The agreement was with the agent who was here. I cannot give the exact terms of it. I am positive, however, that the agreement was that my future earnings or commissions were to be returned to the company in liquidation of the old debt.

5. To the fifth interrogatory, he answers and saith: I did not inform Magee and Hall that I was behindhand, or of the agreement.

6. To the sixth interrogatory, he saith: Magee and Hall first learned of the agreement and of the indebtedness in the winter of 1872. They did not obtain knowledge of either of these facts while I acted as agent.

7. To the seventh interrogatory, he saith: The exact amount received in plaintiffs' business after the bond was given, was
$41,114.81. forty-one thousand one hundred and fourteen & $\frac{81}{100}$ dollars, ($41,114.81.) This amount was the gross receipts. I remitted to plaintiffs of this amount thirty-four thou-
$34,090.48. sand and ninety & $\frac{48}{100}$ dollars.

4

$2,761.23. 8. To the eighth interrogatory, he saith: The sum of twenty-seven hundred and sixty-one & $\frac{23}{100}$ dollars belonged to me for commisions or compensation, (2,761.23.) The sum of thirty-eight thousand three hundred and fifty-

$38,353.58. three & $\frac{58}{100}$ dollars belonged to plaintiffs, ($38,353.58.)

9. To the ninth interrogatory, he saith: I remitted to plaintiffs of my commissions received after the bond was

$2,157.7. given, twenty-one hundred and fifty-seven & $\frac{73}{100}$ dollars. The remittance of my commissions to plaintiff was made because it was agreed to before the bond was given. It was not done independent of said agreement.

10. To the tenth interrogatory, he answers and says: The agent of the company with whom I dealt in giving the bond and making the agreement was Mr. Pleasants, agent of the company. His headquarters were in Richmond. I first spoke of it. I promised the com-

95 pany to remit all my commissions. If I had not done so they would not have retained me as agent.

11. To the eleventh interrogatory, he saith: I have already stated the terms and conditions on which I was retained as agent. The securities did not know, nor were they informed, of the terms on which I was retained.

12. To the twelfth interrogatory, he saith: No conditions or terms, but friendship. They were asked to sign the bond and they signed it. My means of supporting my family were nothing but my labor.

13. To the thirteenth interrogatory, he saith: I think the agent for the company was in Mobile about a week. I can't say exactly. It might have been less. I cannot say where the bond was prepared, whether he prepared it here or brought it with him from New York. I do not know of any correspondence between the agent and plaintiffs. I hardly

96 think he remained long enough to write and get an answer.

14. To the fourteenth interrogatory, he saith: I obtained the amount remitted on my old indebtedness from my commissions earned from the company as their agent after the bond was given.

15. To the fifteenth interrogatory, he saith: I have no other matter to say.

(S'g'd) HENRY V. H. VOORHEES.

Examined, and by the witness subscribed and sworn to, before me this 30th day of July, A. D. 1873.

(Signed) JAMES GILLETTE,
U. S. Commissioner.

EXHIBIT A.

Statement of collections for Manhattan Life-Ins. Co.

1871.			
June. Amt. collected	$2,065 30		
Less commission & expenses	901 81		
		$1,163	49
July. Amt. collected	$1,094 00		
Less commission & expenses	440 05		
		653	95
August. Amt. collected	$311 00		
Less commission & expenses	122 57		
		188	43

Sept.	Amt. collected	$1,615 23	
	Less commission & expenses	862 35	
			752 88
97	October. Amt. collected	$2,114 29	
	Less commission & expenses	1,170 84	
			$943 45
	November. Amt. collected	$1,590 35	
	Less commission & expenses	1,029 45	
			560 90
			$4,263 10

Mobile, July 30, 1873.

HENRY V. H. VOORHEES.

(Written across the face:)
Exhibit A to the deposition of Henry V. H. Voorhees.
JAMES GILLETTE,
U. S. Commissioner.

Answers on cross-examination of Henry V. H. Voorhees.

1. To the first cross-interrogatory, he saith: No.

2. To the second cross-interrogatory, he saith: I stated simply that all the agents were required to give bond. I do not think I stated that it was necessary to retain my office. No questions were asked about my condition or accounts. I suppose they knew that I was previously an agent. Mr. Hall did. There was no falsehood, misrepresentation, or fraudulent consideration whatever made by me to them.

3. To the third cross-interrogatory, he saith: The plaintiff or
98 agent never saw my securities or had any conversation with him. No, no.

4. To the fourth cross-interrogatory, he saith: Yes. The plaintiff simply required a bond of me. I believe it was a printed form. I do not know whether it was the same as in other cases.

5. To the fifth cross-interrogatory, he saith: No.

6. To the sixth cross-interrogatory, he saith: I simply gave the names of my sureties. I forwarded the bond to New York by mail.

2nd int. so numbered. 6. To the sixth cross-interrogatory, he saith: Yes. I so stated. This was about all that was said.

7. To the seventh cross-interrogatory, he saith: It was a voluntary promise on my part to remit my commissions. I do not think
99 there was any written contract. I do not exactly remember. I do not think there was anything in writing except what was stated in my letter to the company when I enclosed the bond.

8. To the eighth cross-interrogatory, he saith: Yes.

9. To the ninth cross-interrogatory, he saith: The Exhibit A[1] to the cross-interrogatories is a correct statement as to dates and amounts of remittances, and as to debits and credits except the sum of twenty-five dollars paid Mr. *E*iglander, one of the general agents of the company, March 6, 1872, for which I hold his receipt.

10. To the tenth cross-interrogatory, he saith: Yes. The Exhibit A to cross-interrogatories is a correct copy of the statement then furnished by me. My answer is yes to all of this cross-interrogatory. The sum of twenty-five dollars, heretofore referred to, should be deducted from the amount bal. due.

100 11. To the eleventh cross-interrogatory, he saith: The several

amounts collected by me, and the dates, (not remitted to plaintiffs,) since 2nd March, 1871, are correctly stated in the 2nd exhibit to the cross-interrogatories. I also attach a statement to my answers herein, of these amounts, which statement is marked "Exhibit A." I have examined my books and verified my statement and answers. Yes; all the commissions and money sent to plaintiffs by me before and since the date of the bond are correctly stated in Exhibit 1 to cross-interrogatories.

12. To the twelfth cross-interrogatory, he saith: I am aware of no other matter or fact important to either side.

(S'g'd) HENRY V. H. VOORHEES.

Examined, and by the witness subscribed and sworn to, before me this 30th day of July, 1873.

(Signed) JAMES GILLETTE,
U. S. Commissioner So. Dist. Alabama.

101 *Certificate of comm'r.*

And I further certify that I caused the witnesss aforesaid to come before me at the times and places hereinbefore mentioned, and that he was duly sworn by me, and that his deposition was by me reduced to writing, and was subscribed to by the witness after having been read over to him.

I further certify that I am not of counsel or attorney for either side or for either of said parties, and I am not interested in the event of said cause.

Witness my hand and seal this the 30th day of July, A. D. 1873.

SEAL OF JAMES GILLETTE, U. S. COMM'R. (Signed) JAMES GILLETTE,
United States Commissioner,
Southern District of Alabama.

Judgment.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama, December term, 1873.

At a regular term of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, convened at the
102 city of Mobile, in the United States court-room of the custom-house, on the 22d day of December, (being the fourth Monday of said month,) A. D. 1873, present, the Hon. William B. Woods, judge, presiding.

* * * * * * *

MONDAY MORNING, *December 29th.*

Court met pursuant to adjournment. Present, the honorable William B. Woods, judge, presiding.

* * * * * * *

THE MANHATTAN LIFE-INSURANCE CO.
vs.
JACOB MAGEE AND HENRY HALL.

This day come the parties, by their attorneys, and a demurrer having been filed by the plaintiff to the third plea of the defendants, the same

is argued by counsel, and after due deliberation the court is of opinion that said third plea is insufficient, and orders that said demurrer be sustained.

And thereupon, to try the issues joined, comes a jury of good and lawful men, to wit: Wm. C. Yaynor and eleven others, who, being duly empannelled and sworn, upon their oaths do say:

"We, the jury, find a verdict for the plaintiff in the sum of ($4,970.77) four thousand nine hundred and seventy dollars and seventy-
103 seven hundredths of a dollar.

"WM. C. YAYNOR, *Foreman.*"

It is, therefore, considered by the court that the plaintiff, The Manhattan Life-Insurance Company, have and recover of the defendants, Jacob Magee and Henry Hall, the said sum of four thousand nine hundred and seventy dollars and seventy-seven cents, its damages, and the costs of this suit, for which execution may issue.

* * * * * * *

Court adjourned until to-morrow morning at 10 o'clock.

UNITED STATES OF AMERICA,
Southern District of Alabama:

I, Nathaniel W. Trimble, clerk of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 103 inclusive, contain a true, correct, and complete transcript of all the papers, proceedings, and records in the case of the Manhattan Life-Insurance
104 Company against Jacob Magee and Henry Hall, as the same appear from the original papers on file and the records of my said office.

In testimony whereof I have hereunto subscribed my name and caused the seal of said circuit court to be affixed, at office, in Mobile, this sixteenth day of February, in the year of our Lord 1874, and of our Independence the 98th year.

Attest:

[SEAL.] NATHANIEL W. TRIMBLE, *Clerk, &c.*

(Indorsement on cover:) No. 195. Jacob Magee and Henry Hall, plaintiff' in error, vs. The Manhattan Life-Insurance Company. S. Alabama C. C. U. S. Filed 29 June, 1874.

Supreme Court of the United States.

JACOB MAGEE & HENRY HALL,
vs.
THE MANHATTAN LIFE INS. CO. } No. 195.

Brief of P. Phillips,

FOR PLAINTIFF IN ERROR.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court of the United States.

JACOB MAGEE & HENRY HALL,
vs.
THE MANHATTAN LIFE INS. CO. } No. 195.

Brief of P. Phillips,

FOR PLAINTIFF IN ERROR.

The plaintiffs in error were sued in the Circuit Court, United States, for the southern district of Alabama, as sureties on a bond given by Henry V. H. Vorhees, an agent of the defendant residing and doing business in the City of Mobile, in effecting Insurances.

The Bond, as set forth in the declaration, was executed on the 2d March, 1870, and is conditioned that the said Vorhees "shall faithfully conform to all instructions he may receive from the said Manhattan Life Insurance Company, and shall on the first day of each month remit to the office of the said company all monies received by him (not previously remitted) as such agent *less his commissions*, together with his account of "

Several pleas were filed by the defen
The *third* after craving oyer averred—
execution of this bond, Vorhees was leg
the plaintiffs for monies received in c
business as agent in Mobile, of which the
* * * that the plaintiffs required the execu
as a ~~creditor~~ for retaining him as agent; *

Supreme Court of the United States.

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The Bond, as set forth in the declaration, was executed on the 2d March, 1870, and is conditioned that the said Vorhees "shall faithfully conform to all instructions he may receive from the said Manhattan Life Insurance Company, and shall on the first day of each month remit to the office of the said company all monies received by him (not previously remitted) as such agent *less his commissions*, together with his account of the same."

Several pleas were filed by the defendants (sureties). The *third* after craving oyer averred—that before the execution of this bond, Vorhees was ~~legally~~ largely indebted to the plaintiffs for monies received in conducting their business as agent in Mobile, of which they had no notice; * * * that the plaintiffs required the execution of this bond as a ~~creditor~~ condition for retaining him as agent; * * * that in addi-

tion to this the plaintiffs also required of Vorhees an *agreement that all his future commissions* earned in his business as agent, should be paid over to them, *and applied to his then past indebtedness*, and for which they had no security; * * * that the plaintiffs then well knew the fact that Vorhees had no property or means out of which said indebtedness could be paid, and that he could not support his family, but by his future acquisitions, and that this appropriation of his commissions would compel him to appropriate a similar amount for his support out of the monies received by him belonging to the plaintiffs; * * * that Vorhees before the execution of the bond did enter into this agreement with the plaintiffs, and did pay over his commissions subsequently earned, which were credited to his past indebtedness, but retained a corresponding amount from the monies received for the plaintiffs as necessity compelled him to do; * * * that at the time they executed the bond they had no knowledge of this agreemeut, and if they had known of it, they would not have executed the bond. pp. 5, 6.

The plea then further avers that the said agreement and its execution as set forth in the plea was a fraud on the defendants, and that they are not bound by said writing obligatory.

To this plea there was a demurrer; and on the hearing the court sustained it.

On the issue joined on the other pleas there was a verdict and judgment for the plaintiffs.

Assignment of Error.

The plaintiffs here assigns for error, the judgment of the court sustaining the demurrer.

The demurrer took the case from the jury and raised the question of law for the court, whether the facts stated in the plea and all just inferences deducible from them constituted a defence to the bond.

The question now under consideration was before this Court in the case of Etting vs. Bk. U. S., 11 Wheat., 59. Etting had become a surety for an officer of the bank who had made a default, but Etting alleged that this was known to the bank and not communicated to him.

When all the circumstances of the transaction were put in evidence, the plaintiff asked the court to instruct the jury that to vitiate the note and endorsement in law, on the ground of a fraudulent misrepresentation, or fraudulent concealment of circumstances known to them, it was incumbent on the defendant to show that he applied to plaintiff for information, and that in such application the plaintiff misrepresented or concealed the facts.

This charge the court gave, and there was judgment for plaintiff.

On writ of error it was held by the court that though it is the ~~promise~~ province of the court to construe written agreements, yet, when the effect of such instruments depends not merely on the meaning of the instruments but on collateral facts *in pais* and extrinsic circumstances, the inferences of fact to be drawn from them should be left to the jury.

province

The legality of the instruction, which withdrew the question from the jury and referred the law to the court, was assailed at the bar by Webster and Taney citing a large number of authorities.

On this main proposition the court say: "No attempt will be made to analyze the cases cited or to decide on their application to the case before us, because the judges

are divided on the question. The principles of law which have been argued cannot therefore be settled."

Whether a fraud be material or otherwise is, on the decided weight of authority, a question for the jury and not a question of law. 2 Pars, on Con., 267.

The Concealment of Past Indebtedness.

DOES SUCH CONCEALMENT DISCHARGE THE SURETY?

The rule, as stated by Cicero, is that it is the duty of every man in point of morals to disclose all facts to another with whom he is dealing which are material to his interest.

Pothier maintains that good faith and justice require that neither party to a contract should conceal facts within his own knowledge, which the other party had no means at the time of knowing, if the facts materially affect the subject matter.

Paley makes no distinction between a direct falsehood and a designed concealment. The motives in the two cases are the same.

Kent, says, if there be an intentional concealment of material facts in the making of a contract in cases where both parties have not equal access to the means of information, it will be deemed unfair dealing, and avoid the contract. As a general rule each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them and they be not open and naked, or equally within the reach of his observation.

Story says, this doctrine of Chancellor Kent would seem to require some qualification, by limiting it to cases where one party is under some obligation to communicate the facts, or where there is a peculiar relation, trust

or confidence, which authorizes the other party to act upon the presumption that there is no concealment of any material fact.

This learned commentator having described the difference between extrinsic and intrinsic circumstances, states that there are many cases of the latter character in which courts of law and equity proceed upon a doctrine strictly analagous to that of the Roman law.

Thus taking a guaranty from the surety, concealing from him facts which go to increase his risk.

So, if one, cheated by his clerk, applies for security, which is given, without knowledge of the clerk's detault being communicated to him, in such instances the contract is void.

For the doctrine thus asserted by him, he refers to the cases of Pidcock vs. Bishop, and Smith vs. Bk. Scotland, 1 Story Eq., § 215.

In speaking of the cases where undue concealment arises from the peculiar relation or fiduciary character between the parties, he enumerates, as belonging to this class, contracts between principal and surety.

In reference to such engagements he says, they "import entire good faith and confidence, between parties in regard to the whole transaction, any concealment of material facts, or any express or implied misrepresentation, or any due advantage, either by surprise or by withholding information, will, undoubtedly, furnish sufficient ground to invalidate the contract."

In Smith vs. Bk. Scotland, 1 Dowl., 272, the party having doubts as to the fidelity of his agent, and requiring fresh security from him, was held to be in *mala fide* to the surety to whom these doubts had not been communicated.

In Railton vs. Mathews, 10 Cl. and Fin., 934, the Bill of Exceptions stated that before the bond was taken the obligee was aware of the misconduct of the agent, but did not disclose the fact to the proposed surety.

The judge charged the jury "that the concealment must be wilful and intentional on the part of the defenders, and with a view to the advantage they were thereby to receive."

This charge was assailed in the House of Lords by Sergeant Talfourd as erroneous. He maintained the law to be "that concealment or non-communication of the irregularities of the agent, whether they were influenced by any advantage to themselves or not, was an undue concealment.

In support of which he cited the following authorities, here noted for the convenience of the court.

Montague vs. Titcomb, 2 Vern., 518.
Shepherd vs. Beecher, 2 Pr. Wms., 288.
Rees vs. Barrington, 2 Ves. Jr., 540.
Smith vs. Bk. Scotland, 1 Dow., 272.
Thompson vs. Bk. Scotland, 2 Shaw's App. Cas., 316.

Concurring and separate opinions were delivered by Lords Cottenham and Campbell. The judgment below was reversed and a new trial ordered.

The law was thus stated by Lord Campbell:

"If the defenders had facts within their knowledge material for the surety to know, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharge the surety. Whether they concealed those facts from one motive or another, I apprehend is wholly immaterial

In Lee vs. Jones, decided in 1864, ~~15 B. & C., N. S.~~ 500, the opinion in the above case is reviewed and affirm-

ed; the court saying it was a mistake to suppose that the doctrine in that case had been qualified by the opinion in Hamilton vs. Watson, 12 Cl. & Fin., 109, in which Lord Cottenham, suggested, as a criterion of innocent silence on the part of a creditor taking a suretyship bond, whether the fact not disclosed, be one, the existence of which might naturally be expected by the surety, as the indebtedness to his bankers, of a person asking friends to be surety for him to those bankers, would be.

The facts in the case now cited were—that one P. was employed by plffs. to sell coal on a commission. Having fallen into arrears with his remittances, the plffs. required him to find surety for his continued employment. At the request of P. the defendant became surety. The agreement of guaranty recited the terms of dealing between the plffts. and P; but the fact that P. was already indebted to the plaintiffs in a large sum was concealed from the surety.

The surety being sued, pleaded that this concealment of a material fact was a fraud upon him.

Held—"that the *non-communication* by the plaintiff to defendant of the fact that P. was largely indebted at the time, was evidence for the jury in support of the plea.

The doctrine of Railton vs. Matthews, was again affirmed in Phillips vs. Foxhall, Law Rep., 7, Q. B. 666, decided in 1872.

Here the controversy was on a continuing guaranty for the honesty of a servant, in which it is held, that if the master discovers that the servant has been guilty of dishonesty, and instead of dismissing, continues him in his employ, without the knowledge and consent of the surety, he cannot have recourse to the surety to make good any loss which may arise from the dishonesty of the servant, during the subsequent service.

52, Pennsylvania State, 343.

The agreement to appropriate the Commissions to the Agent's past indebtedness.

This agreement, as stated in the plea, was a material variation of the obligation on which the surety consented to be bound.

It was not only a probable increase of the risk he assumed, but the probable cause of the agent's default, and for which the suit was brought.

On this subject, Story says:

"If any stipulations are made, between the creditor and debtor, which are not communicated to the surety, and are inconsistent with the terms of the contract, or are prejudicial to his interest, they will operate as a discharge of the surety.

1 Story's Eq., § 218, 324.

In support of this we have the case of Pidcock vs. ~~Hinton~~, 3 B. & C., 605.

Here there was an agreement between vendor and vendee of goods, that the latter should pay 10 shillings per ton beyond the market price, which sum was to be applied to the liquidation of an old debt due the vendor.

The payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety.

Held that this was a fraud on the surety, and rendered the guaranty void.

All the Judges concurred; Abbott, C. J. saying:

"The effect of the agreement would be to compel an appropriation to the payment of the old debt, of a portion of the funds which the surety might reasonably suppose would go towards defraying the debt for which he made himself collaterally responsible. Such a bargain increased his responsibility. That being so, I am of

opinion the withholding the knowledge of that bargain was a fraud upon him and violated the contract."

So when a surety to a bond given for the faithful discharge of the duties of the principal as coal agent, the bond reciting that the agent was to receive a fixed salary of £ 100 per annum, the surety was discharged by reason of an agreement which substituted for the salary a commission per ton, although this amounted to a larger compensation than the fixed salary.

North Western R. R., vs. Whinray, 26 Eng. Law and Eq., 488.

Whenever there is a variation from the contract to which the surety has agreed he may legally claim *non hoec in fœdera veni.*

As said by this court—"To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. Courts of equity, as well as of law, have constantly scanned the contracts of sureties with considerable strictness.

Miller vs. Stewart, 9 Wheat, 682.

In support of the doctrine that discharges the surety where there has been any variation, see—

Peck vs. Durett, 9 Dana, 488.
McWilliams vs. Mason, 6 Duer., 276.
Mayhew vs. Boyd, 5 Md., 102.
Burge on Suretyship, p. 15.

Defense Available at Law as well as in Equity.

Some of the cases cited were in equity, and some at law, but we maintain that the defense of a surety on the

grounds here stated by the plea are as available in the one jurisdiction as the other.

In King vs. Baldwin, 2 John Chan., 556, the bill was filed by a surety to be relieved, on the ground that the note had been procured by fraud. It appeared that in a suit at law judgment had been rendered against him.

The chancellor held the recovery at law a sufficient objection to the bill. There is nothing, says he, in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction. Whatever would exonerate the surety in one court ought also in the other. The facts being ascertained, the rule must be the same in both jurisdictions This was, undoubtedly, the opinion of Lord Loughborough in the case to which the Chief Justice refers, in the People vs. Jansen, 7 John's Rep., 332.

The case in 7 John was an action at law against the surety on a bond given for the faithful discharge of the duties of a loan officer, and the defense, that he had been suffered to continue in office after repeated defaults, was held good.

That fraud is cognizable in a court of law as well as in a court of equity, is a well established principle in this Court.

Swayn vs. Burke, 12 Pet., 23.

On the doctrine of these cases we maintain that the non-communication to the surety of the past indebtedness of the agent, under the circumstances stated in the plea, was *undue concealment.*

Again, the agreement by which the agent was to pay over not only all the money collected for his principal, but also all his commissions, which latter were to be ap-

plied to his past default was a *change in a material particular of his obligation*, and tended to increase the risk which the surety had incurred.

If both these propositions, or either of them, can be sustained, the judgment must be reversed.

P. PHILLIPS,
for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

JACOB MAGEE AND HENRY HALL, PLAINTIFFS IN ERROR,

vs.

THE MANHATTAN LIFE INSURANCE COMPANY.

No. 195.

BRIEF FOR DEFENDANT IN ERROR.

The sole error assigned is that the court erred in sustaining the plaintiff's demurrer to the defendant's third plea. (Plaintiff's brief, p. 2.)

I.

The error, if any, was waived by the defendants' going to trial on the issues joined on the first and second plea.

If, when a demurrer is sustained, the opposite party amends, he waives the error.

U. S. *vs.* Boyd, 5 How., 29, 51.

In principle it is the same if, having filed several pleas, he go to trial on some of them.

And so *it seems* on *authority*.

Townsend *vs.* Jemison, 7 How., 706, 718.

In this case a demurrer not appearing to have been disposed of, the court presumed it to have been ruled in favor

of the plaintiff, (who recovered below,) *and considered this the end of the matter.*

Powell on Appellate Proceedings, who says that by trial on other issues, after sustaining a demurrer, the error or demurrer is not waived, cites only Ohio authorities, pp. 179, 180, sec. 98, and in that State the question is reserved by statute.

Knox Co. Bank *vs.* Lloyd, 18 Ohio St., 361.

See argument in this case (pp. 359, 361) citing act of March 12, 1845, and Code, sec. 513. And exceptions seem to have been always taken to the ruling. Pp. 355, 356, 357.

So it is in Alabama, ~~but only when the demurrer is overruled, not when it is sustained as in this case.~~

~~Clay's Digest, p. 384, sec. 121.~~

~~Stallings *vs.* Newman, 26 Ala., 310.~~

Code 2254-5

II.

The record in regard to the demurrer is imperfect. To complete the record judgment should have been entered on the demurrer in favor of the plaintiff.

Dicker *vs.* Adams, 2 Bos. & Pal., 163.

No judgment was entered on the demurrer, and the plea was not stricken out. The demurrer was thus not disposed of. This is an *irregularity* waived by going to trial.

In 11 Peters this Court said :

" The counsel for plaintiff in error also contended for the reversal of the judgment on the ground of sundry irregularities in the papers of the cause in the court below, apparent on the record. Such as that a general demurrer had been filed and had not been disposed of. * * that the case had been submitted to the jury without an issue

between the parties * * * These irregularities, whatever might have been their original imperfections if not waived, were in our opinion waived by the defendant going to trial upon the merits, and cannot now constitute any objection upon the present writ of error. For a writ of error does not bring up for review any irregularities of that sort."

Evans *vs.* Gee, 11 Pet., 80, 85.

III.

The matter contained in the third plea might have been given in evidence under the second plea, and so injury was done the defendant by sustaining the demurrer. And so the judgment cannot be reversed.

Knox Co. Bank *vs.* Lloyd, *supra.* Lawson Rules 38 Ala 279

Powell Ap. Pro., sec. 98.

The second plea avers the indebtedness of Vorhees, and the want of notice to or knowledge thereof by the defendants, as the same are averred in the third plea. The second plea further sets up the agreement made between the plaintiff and Vorhees, as to the appropriation of his commissions; for it avers that they agreed that all the moneys Vorhees should receive should be remitted and applied to the old debt. The two pleas are, in fact, but one; the matter of each being that the bond was obtained by fraud.

And see agreement Record Rec'd 4. Fol 12

IV.

The third plea is bad. It avers:

That Vorhees was, when the bond was made and delivered, largely indebted to the plaintiffs for moneys before that time received by him, belonging to the plaintiffs, in conducting their business, as agent in Mobile, of which the defendants had no notice or knowledge.

And that plaintiff required of Vorhees a promise or agreement that all his future commissions earned in plain-

tiff's business, should be paid to the plaintiff on account of his then existing debt; and the defendants had no knowledge or notice of this agreement.

That Vorhees had no property or means of his own out of which he could pay the debt, and the plaintiff knew this.

That Voreees has no means of support but his future acquisitions by his labor; and the plaintiff knew this, and knew that the appropriation of his commissions, &c., would compel him to appropriate a similar amount to his support out of moneys received by him belonging to plaintiffs.

The plea does not aver that these facts were concealed from defendants.

The plea does not charge any concealment or misrepresentation of any fact by the defendants.

The plea does not charge that the plaintiffs did any wrongful act or omitted to perform any duty in the premises.

The agreement is charged to have been made "before the bond was executed." Nevertheless, the plea charges "that said agreement and its execution as set forth in this plea was a fraud on these defendants;" that is, that an agreement, lawful in itself between the plaintiff and the principal, before the defendants executed the bond, and when it is not averred that either of the parties knew the defendants ever would be called on to execute or would execute the bond, was a fraud on them.

The plea does aver that Vorhees had no other means of support for himself and family but the acquisitions of his labor.

It does not aver that he had no other business than the employment given him by the plaintiff. His commissions on the plaintiffs' business may have been an insignificant part of his income; and the appropriation of them to pay his debt, therefore, did not necessarily involve the necessity of committing a breach of trust. And moreover,

the allegation that the plaintiff knew that Vorhees would be compelled to commit a breach of trust, is not the allegation of any fact, but merely the imputation to the plaintiff of a foreknowledge of consequences.

It is no legal or necessary consequence of the appropriation of any part of one's income to pay his debts that he should convert to his own use the money of others.

If the commissions were necessary to Vorhees' support, the more probable course was that he would not remit them; not that he would remit them and retain other moneys.

V.

The acts referred to do not amount to fraud, and as the plea does not charge an *intent* to defraud it is insufficient.

When the facts, set forth in the plea at law, do not constitute fraud the intention to defraud must be averred.

Moss *vs.* Riddle, 5 Cranch, 351.

Mere non-communication is not concealment. Concealment is a failure to communicate when one has the opportunity to communicate. There may be non-communication without concealment, and there may be concealment without fraud.

"It is now regarded as settled that there must be something which amounts to fraud to enable the surety to say that he is released from his contract on account of misrepresentation or concealment."

Strong's Eq. Jur., 325 *a.*

The cases on this subject are too numerous to be reviewed, and we prefer to cite the conclusions of text writers of reputation who notice the principal cases.

From De Colyar on Guarantees, p. 362:

"It seems once to have been thought that the rule as to

the disclosure of all material facts prevailing in assurances upon marine and life risks applies also to contracts of guaranty; the rule is that, upon a policy to cover a marine or life risk the assured is bound at his peril to disclose all material circumstances to the assurer, and that their non-disclosure, though innocent, and not fraudulent, vitiates the contract. The impression that the rule in question applied also to guaranties was created by a dictum of Lord Truro in Owen *vs.* Homan. The erroneous impression thus created was, however, corrected in the case of the North British Insurance Company *vs.* Loyd, * * * p. 364. In this case, therefore, the Court was of the opinion that the circumstance not disclosed was not a material circumstance, and that even if it had been, its concealment, unless fraudulent, would not have the effect of vitiating the guaranty. * * * * *

"The decision in the case of the North British Insurance Company *vs.* Loyd, is certainly quite in harmony with the doctrine of courts of equity; who hold that in order to entitle a surety to relief in equity on the ground of misrepresentation or concealment at the time of the contract, he must make out a case amounting to fraud.

"When we speak of a fraudulent as distinguished from an innocent concealment we speak of one which is wilful and intentional; however, it is necessary to observe that though every fraudulent concealment is wilful and intentional the converse of that proposition is not correct, and that every wilful and intentional concealment is not necessarily by the law of England fraudulent. Therefore, it is not every wilful and intentional concealment that will have this effect, for every wilful and intentional concealment is not necessarily fraudulent. Now it appears that there are certain things which it is the duty of the creditor need not disclose unless and until requested to do by the surety. If, therefore, the creditor, wilfully and intentionally, omit to disclose those things which he is bound spontaneously

to disclose, he is of course guilty of a fraudulent concealment which vitiates the guaranty and relieves the surety from liability. But an intentional and wilful concealment (as distinguished from a misrepresentation) of those things which he need not disclose unless the surety requests him to do so, will not amount to a fraudulent concealment, and will not, therefore, vitiate the guaranty.

"Having said thus much, we will endeavor to explain what things the surety is bound spontaneously to disclose, and what are the things which the surety must ascertain for himself from the creditor.

"In Hamilton *vs.* Watson, Lord Campbell lays down "that this might be considered as the criterion whether the disclosure ought to be made voluntarily; whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction; that is, whether there be a contract between the debtor and the creditor to the effect that his positions shall be different from that which the surety might naturally upset; and if so, the surety is to see whether that is to be disclosed to him. But if there be nothing which might naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information, which he requires.

"In Wythe *vs.* Labruchen, Lord Chancellor Chelensford said, "the concealment, too, must be of some material part of the transaction itself, between the creditor and debtor, to which the suretyship relates. The creditor is under no obligation to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage, or which will render his position more hazardous."

From Kerr on Frauds, p. 94:

"Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false. If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated. Concealment to be of any avail whatever, either at law or in equity, must be *dolus darus locum contractui.* There must be the suppression of a fact, the knowledge of which it is reasonable to suppose would have made the other party to the transaction abstain from it altogether. Concealment of a fact is not material if the statement of that fact would not have induced a man, [otherwise desirous of entering into the transaction,] to abstain from it. A concealment, to be material, must be the concealment of something that the party concealing was under some legal or equitable obligation to disclose.

From Kerr on Frauds, p. 94:

"Misrepresentation, however, goes for nothing either at law or in equity, unless a man has been misled thereby to his prejudice. Fraud without damage is not sufficient to support an action or to be a ground for relief in equity. Fraud gives a cause of action if it leads to any sort of damage, but in order that a false representation should give a cause of action the damage must be the immediate and not the remote cause of the representation."

P. 122:

"The strict rule with respect to non-disclosure, which obtains in the case of policies of insurance does not extend to contracts of suretyship or guarantee. If the creditor be specially communicated with on the subject he is bound to make a full, fair, and honest communication

of every circumstance, within his knowledge, calculated in any way to influence the discretion of the surety on entering into the required obligations. But he is not under any duty to disclose to the intended surety voluntarily, and without being asked to do so, any circumstances unconnected with the particular transaction in which he is about to engage, and which will render his position more hazardous, or to inform him of any matter affecting the general credit of the debtor, or to call his attention to the transaction, unless there be something in it which might not naturally be expected to take place between the parties. If the intended surety desires to know any particular matter of which the creditor may be informed, he must make it the subject of a distinct inquiry. But if there be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure. If, for instance, there be any private arrangement or secret understanding between the creditor and the debtor, connected with the particular transaction in which he might reasonably have contemplated to be, or if a party having reason to suspect the fidelity of his clerk, requires security in such a way as to hold him out as one whom he considers a trustworthy person, or if the creditor has notice that the circumstances under which the debtor has obtained the concurrence of the surety, lead to the suspicion of fraud, concealment is fraudulent, and will violate the transaction. "It must, in every sense," said Blackburn in Lee *vs.* Jones, "depend on the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist, and that the fact must be generally a question of fact for the jury."

Mr. Robinson, in his 5th Volume on Defences, pp. 554 to 558, reviews the principal cases on this subject, and

points out that some actual concealment is a necessary in gredient in such fraud as avoids the bond.

Thus, in reviewing the case of Smith *vs.* The Bank of Scotland (1 Dow), he observes that "Lord Eldon and Lord Redesdale evidently proceeded on the ground of a representation to the surety of the trustworthiness in the principal known to, or believed by, the bank to be untrue."

In fact, in all the cases reviewed by Mr. Robinson, the opinions of the judges proceed upon the supposition of an actual concealment.

Whatever authority there may be for the doctrine that the non-communication of a circumstance affecting the credit of the principal will avoid the bond, that learned and laborious writer has thought it unworthy of mention; while, on the contrary, he takes care to cite what Pollock, C. B., said (in 10 Exch., 534), "That the mere relation of credit and surety requires, in all cases, a full disclosure of all material circumstances, was distinctly denied by the lords in the case of Hamilton *vs.* Watson."

We think we may say, with confidence, that the result of the discussion in Mr. Robinson's work is embodied in what he quotes from Lord Campbell's remarks, in Hamilton *vs.* Watson.

The case of Hamilton *vs.* Watson (12 C. and L., 109) is very much like the present case. A cash credit, on the guarantee of sureties, had been granted to a man already in debt to the bankers, who granted it; and the debt which had not been mentioned to the sureties was discharged by a check, which, but for the new cash credit, the debtor would not have been in a position to draw. The counsel for defendant urged that the existing debt ought to have been mentioned; but it was held otherwise.

In the North British Insurance Company *vs.* Loyd (10 Exch., 533), that the rule that all material circumstances known to the assured must be disclosed to the under-

writer is peculiar to contracts of insurance, and does not apply to contracts of guaranty.

Burks *vs.* Monterline, 6 Bush., Ky. 20, was an action against Ross and Burks upon a note made by them payable one year from date, without interest. The defence of Burks was that he was only surety for Ross; and that Ross had paid in advance usurious interest at the rate of fifteen per cent., which payment was fraudulently concealed from the said defendant when he signed the note. Judgment for plaintiff for the amount of the note, less the usurious excess.

The Court cited and approved the doctrine laid down by Story in sections 214, 215 and 324, of his Equity Jurisprudence, that the contract of suretyship imports entire good faith; and that any concealment of material facts, or any express or implied misrepresentation of facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will invalidate the contract; that there are cases where courts treat the concealment of intrinsic circumstances as a breach of trust and confidence; and that in most cases of this sort the very silence of the party must import as much, or a direct affirmation, and be deemed equivalent to it.

"*Suppressio veri*," said the Court, "is tantamount to *suggestio falsi*;" and applying those principles to the case in hand, the Court said:

"The answer might be understood as importing fraudulent misrepresentation and concealment. But such is not the necessary deduction from the face of the note and the general allegation of concealment. Unless the obligee knew when Burks signed the note that he did so as surety only, or unless he procured his signature, or was present when he signed, and then misrepresented or suppressed the truth, the acceptance of the note was not evidence of

fraud; and the simple charge, as made, of misrepresentation and concealment does not show fraud, because the principal may have presented to her the note signed in her absence, when she could have made no communication to the surety, and could therefore have been guilty of neither misrepresentation nor concealment; and the general allegation of concealment does not negative the idea of her absence. The law presumes that the obligees knew the status of the parties to the note, and consequently that Burke was surety."

In Ham *vs.* Greve *et al.*, A. D. 1870, 34 Ind., 18, the plea was that at the time of the execution of said note the said McNett was wholly insolvent, which fact was well known to the plaintiffs, but was not known to the defendant; and the plaintiffs then and there fraudulently concealed the fact of said insolvency from the defendant and induced him to sign the note." On demurrer the Court said that the alleged concealment did not amount to fraud; that it did not appear that the plaintiffs knew that the defendant was ignorant of Mr. Nett's insolvency.

The Court said: "We think the real question presented by this paragraph, or the answer, may be stated thus: is it the duty of a person about to take a note with surety from one whom he knows to be insolvent, to disclose the fact of such insolvency to the proposed surety? And in default of such disclosure, will the contract of the surety be void? We are of opinion that this question must be answered in the negative. The creditor in such case may suppose that the proposed surety is as well advised of the pecuniary condition of the principal as he is himself, and knowing his condition, is willing to help him by becoming his surety. Undoubtedly if the proposed surety should apply to the creditor for information, it would be the duty of the creditor to give him all the information he possessed on that subject, and if he should withhold any fact

within his knowledge, material to the risk to be assumed by the surety, the latter would not be bound. But the creditor is not bound in such case to volunteer his information unsolicited and uncalled for." Pp. 21, 22.

Kent, under the head "of the duty of mutural disclosure," 2 Com., 482, says:

"As a general rule each party is bound to communicate to the other his knowledge of the material facts, *provided he knows the other to be ignorant of them*, and they be not open and naked or equally within the reach of his observation." And again, p. 483, "the inference of fraud is easily and almost inevitably drawn when there is a suppression or concealment of material circumstances, and one of the contracting parties is *knowingly* suffered to deal under a delusion."

Duff v Bond Supra the Court said that no fraud in respect to past transactions could render the bond void as to its prospective operation

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REVIEW OF CASES CITED FOR PLAINTIFF IN ERROR.

For the plaiatiff in error it is argued that the concealment avoids the bond, and his counsel cites:

Pidcock *vs.* Bishop.
Smith *vs.* The Bank of Scotland.
Railton *vs.* Matthews.
Lee *vs.* Jones.
Phillips *vs.* Foxhall.

In the North British Insurance Company *vs.* Lloyd (10 Heulstone and Gordon, 523), Mr. Knowles, to sustain the alleged effect of concealment, cited (pp. 527, 528 and 529) the first three cases here cited by counsel for plaintiff in error.

When Pidcock *vs.* Bishop was cited, Pollock, C. B., said: "In the case relied upon, a gross fraud was practiced upon the party from whom the security was obtained; for the private bargain between the vendor and vendee was that the vendor should pay more than the market price for the goods, and that such excess should go to wipe off an old debt due from the vendee to the vendor."

When Railton *vs.* Matthews (10 C. and L.) was cited, as holding that a mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is under concealment, though not wilful and intentional, or with a view to any advantage to himself, Parke, B., said: "Hamilton *vs.* Watson (12 C. and L., 109,) lays down a contrary doctrine." And, after quoting what Lord Campbell said in the latter case, continued: "Now, I deny that it is established that the rule which obtains, in policies of insurance, is applicable to cases of suretyship. The creditor, in such cases,

is not bound to disclose every fact that might influence the surety. The concealment, to avoid the contract of suretyship, must amount to actual fraud." * * * If we were to lay down that the rule contended for is applicable to suretyship, scarcely any guarantee would stand. Alderson, B.: "If a representation had been made to the defendant which the plaintiffs had, at the time, known to be false, and yet had allowed it in silence, that might have amounted to fraud. If no such communication had the effect contended for, all the guarantees taken by the Government for the good behavior of their officers would be destroyed." P. 529.

When Smith *vs.* The Bank of Scotland was cited, Alderson, B., said: "That authority goes to this extent only—that a case may exist where a bond of suretyship may be invalidated by a non-communication of existing facts, which, if disclosed, would have materially varied the state of facts disclosed." P. 529.

In the principal case, the North British Insurance Co. *vs.* Lloyd, the question was whether the non-communication of a fact, said to be material, avoided the contract of suretyship; the Court said: "But Mr. Knowles still contended that it, (the fact,) was material, and *that in the case of sureties the non-disclosure of such a circumstance was a constructive fraud. We are all of opinion that it was not.* It seems to us an incorrect proposition, that the same rule prevails in the case of guarantees, as in assurance upon ships or lives, in which it is a settled rule that all material circumstances, known to the assured, are to be disclosed, though there be no fraud in the concealment. *This is peculiar to the nature of such contracts*, in what, in general, the assured knows, and the underwriter does not know the circumstances of the voyage, or the state of health." (P. 553.)

Lee *vs.* Jones, 14 C. B., 386, cited by plaintiff in error,

is a most instruc-tive case. It was very ably discussed before the Exchequer Chamber, (17. C. B., 482); and the judges there delivered separate opinions.

The defendant had became surety for any amount that might be due by one Parker, the plaintiff's agent, within the next three years, not exceeding £100. At the time this agreement was made Parker was already in arrears to the amount of £1,332. The agreement recited that Parker had been previously employed, under a contract in writing, thereto annexed, but it was silent as to the fact that in the course of that employment he had fallen in arrears, nor was that fact communicated to the surety. The agreement was drawn by the plaintiff, and sent to the surety to be signed by him. The plea was that the agreement was obtained by the fraud of the plaintiff, and by the frandulent concealment of material facts—replication and issue. On the trial, evidence was admitted to prove the facts stateda bove; verdict and judgment for defendant; and the question was whether that evidence was admissible in support of the plea. When the rule was moved for, William, J., said: "We are all of the opinion that there was no misdirection in the case. What my lord ruled in substance was, that if the jury found the existence of certain facts which would in law amount to fraud, the plea was made out. Some members of the court, however, entertain some doubts whether there were materials for the summing up; *whether there was any active misleading. Upon that the rule may go.*" (P. 397.)

In the Common Pleas, 14 C. B., 386, Erle, C. J., said: "The question for us to decide is, whether there was any evidence of fraud which could properly be left to them." (the jury, p. 397.) * * * *

"It is clear to my mind that the plaintiff's misled the defendant by not informing him of the state of the account between them and Parker, and by inducing him to believe that he was only guaranteeing future accounts.

There was abundant evidence for the jury in support of the plea of fraud."

Willis, J., concurred.

Byles, J. "The question before us is not whether the jury came to a right conclusion, but whether there was any evidence before them to warrant their finding a verdict for the defendant. I think the recitals in the agreement in question were eminently calculated to mislead, *and were pregnant with the assertion* that Parker had faithfully performed his duty up to the time at which that agreement was entered into.

Keating, J.: I am of the same opinion. * * Under the circumstances, I think the recitals in the agreement amounted to an active misrepresentation."

Rule discharged.

This decision was affirmed in the Exchequer Chamber, upon the ground solely that the issue made by the pleadings was, whether the plaintiff had been guilty of fraud, and that the evidence admitted was proper evidence, to go to the jury in support of that issue.

Shee, Blackburn, and Crumpton, JJ., and Channell, Baron, were for affirming the judgment; Pollock, C. B., and Bramwell, B., were for reversing. All delivered separate opinions. Shee said: "The question for our decision is, whether, on the facts before us, as stated in the case, and in the agreements which are to be taken as part of it, there was any evidence for the jury in support of the defendant's plea. And speaking of the agreement which was drawn by the plaintiff and sent to be signed by the defendant, he said there was in it "a studied effort to conceal the truth from those who were interested in knowing it, and whom the plaintiff wanted not to know it;" and that there was cogent evidence of such a suppression of the truth by a partial, inaccurate, and subdolus setting forth by the plaintiffs, in the agreement of facts within their knowledge, as along with the non-communication of other

facts, amounted to a misrepresentation to the proposed sureties.

Blackburn said the question was whether there was evidence to go to the jury in support of the averment of fraud, and that unless actual fraud was proved the substance of the issue was not proved.

He further said:

"It was decided in the North British Insurance Co. *vs.* Lloyd that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guaranty. I concur in this, which I think founded upon principle and authority."

Page 503.

He was for affirming, however, on the ground "that in this case there was evidence of intentional deceit by a false representation amounting to actual fraud."

Crumpton and Channell, after stating that the question was whether there was evidence of fraud to go the jury, said:

"It is quite clear the mere non-disclosure of material facts will not operate so as to avoid a contract of the nature of the one in this case."

They were for affirming upon the ground that the documents drawn and sent by the plaintiffs and the manner in which they were sent to the defendants, &c., were facts from which the jury might infer actual and intentional fraud.

Not one of the judges who sat in the case took the ground that the failure to communicate a material fact would render the contract void; and not one doubted the correctness of the principles laid down in Hamilton *vs.* Watson and The North British Insurance Co. *vs.* Lloyd.

In Phillip *vs.* Foxall it is obvious, from the counsel's statement, that it has no application to this case. The

question was whether in the case of a guaranty of a servant's honesty, the master, when his dishonesty was discovered, had a right to retain him and thus give him the opportunity of increasing the surety's loss; was he not bound to arrest him in his career of dishonesty? If the master had told the surety the servant had proved dishonest that would have done the surety no good, so long as the master retained and trusted him.

Undoubtedly, in that case, three of the six justices approved the case of Smith *vs.* Bank of Scotland, and Railton *vs.* Matthews, and said these cases were not materially affected by Hamilton *vs.* Watson, and North British Insurance Company *vs.* Lloyd.

But they say: "No case directly in point, either in favor of this plea or against it, has been cited before us."

And the reasoning in the case turns more on the keeping of the servant in service after knowledge of his dishonesty, without the *assent* or knowledge of the surety. P. 675.

Justice Blackburn placed his concurrence on the ground 'that a surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against the debtor;" and that the master, by continuing the servant in his employ after knowledge of his default, had lost the right to discharge him for that act; that the right to discharge was one of the remedies the surety was entitled to insist on being used; and so this right being surrendered, the surety was discharged. P. 680.

The grounds of the two justices' concurrence are not stated.

VI.

The alleged agreement between Vorhees and the company, as to the application of the money remitted, worked

no injury to the sureties. When the money was remitted their liability was at an end.

Conclusion.

We submit the judgment should be affirmed.

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